United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1344

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOAQUIM CONCEICAO,
Plaintiff-Appellee,

against

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,
Defendant and Third-Party Plaintiff-Appellee,

and

CIA DE NAV. MAR NETUMAR,
Defendant and Third-Party Plaintiff-Appellant,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
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DOCKET ENTRIES

JOAQUIM CONCEICAO, VS. NEW JERSEY EXPORT MARINE CARPENTERS, INC. ET ANO

71 CIV. 2550

DATE	PROCEEDINGS	Date Order or Judgment Not
Jun8-71	Filed Complaint. Issued Summons.	
Jul 2-71	Issued additional summons.	
Jul 7-71	Issued 2 additional summons.	
Aug.17-71	Filed summons with marshal's ret. Served New Jersey Export Marine Carpenters, Inc. on 6/22/71.	
	Cia De Nav.Mar. Netumar Not served.	
Aug.17-71	Filed additional summons with marshal's ret. Served Mr. Daniel J.Devaney, Pres. by Mrs. Devaney, wife, on 7/12/71.	
Aug.17-71	Filed additional summons with marshal's ret. Served William L. Morris, Registered Agent, by Mr. W.L. Morris on 7/13/71.	
Aug.17-71	Filed additional summons with marshal's ret. Served: Secretary of State, State of New York by David E. Bronnes on 7/9/71. Cia De Nav.Mar.Netumar by Mr. Parasco on 7/7/71.	
Aug.25-71	Filed pltff's Interrogs to deft. New Jersey Export Marine Carpentary.	
Aug.25-71	Filed pltff's Request To Produce	
Aug.25-71	Filed pltff's interrogs. to deft. Cia De Nav. Mar. Netumar	
Aug.25-71	Filed pltff's Request To Produce	
Sep.9-71	Filed Notice of taking Depositions of New Jersey Export Marine Carpenters, Inc. by its officer or managing agent, and also by the Foreman, etc.	
Sep.9-71	Filed Notice of taking Deposition of deft. Cia de Nav. Mar. Netumar.	
Sep.16-71	Filed deft. Third Party Complaint and issued summons	
Sep.22-71	Filed ANSWER of New Jersey Export Marine Carpenters, Inc. to complaint and demand for interrogatories.	C&D
Sep.27-71	Filed Notice of taking Deposition of Plaintiff.	
Oct.8-71	Filed Interrogatories to 3rd pty. deft. International Term.	
Nov.9-71	Filed Summons with Marshal's ret. Served; International Terminal Operating Co., Inc. by Mr. Nolan on 10-4-71	
Nov.11-71	Filed third party defendant's ANSWER to 3rd pty. complaint, cross-complaint and counterclaims, and jury demand.	JJG
Dec.3-71	Filed ANSWER of deft-3rd pty.pltf. to 3rd pty. counterclaim.	
Mar 2.72	Filed Third pty answers to Interrogs.	
Nov.17-72	Filed ANSWER to cross claim by deft and 3rd party pltff Cia De Nav. Mar. Netumar, addressed to 3rd party deft. International	C&C
Nov.17-72	Filed deft. and 3rd party pltff. Cia De Nav.Mar. Netumar, Third Party Complaint	
Nov.17-72	Filed deft. and 3rd party pltff. ANSWER and Cross Claim, to complaint	C&C
Nov.22-72	Filed deft. and 3rd party pltff. Cia.De. Nav. Mar. Netumar, Interrogs. addressed tp pltff.	
Nov.22-72	Filed deft. and 3rd party pltff. Cis.De. Nav. Mar. Netumar, Interrogs. addressed to deft. and 3rd party pltff. N.J. Export Marine	
Nov.22-72	Filed deft. and 3rd party pltff. Cia.De. Nav. Mar. Netumar, Interrogs. addressed to 3rd party deft.	
Nov.28-72	Filed deft. and 3rd party pltff. Cia. De Nav. Mar. Netumar, Notice to take deposition of pltff. on 12-5-72.	
Nov.28-72	Filed pltff's affidavit by Robert L. Ellis, in opposition to pltff's motion pursuant to Rule 37(d), etc.	
Dec.7-72	Filed ANSWER of International Term. Operating Co.Inc. to 3rd pty. complaint.	JJG
Dec.4-72	Filed 3rd pty. summons with marshal's ret. Served International Term. Operating Co.Inc. by Mr. Nolan, V., on 11/21/72.	
Dec.11-72	Filed Notice of Motion Ret. 1/9/73 at 10 AM by New Jersey Export Marine Carpenters, Inc. re: dismiss	LW&C
Dec.11-72	Filed Memorandum of Law in support of deft's motion to dismiss.	
Dec.18-72	Filed Notice of Deposition of plaintiff.	

continued next page

Docket Entries

71 Civil 2550 JOAQUIM CONCEICAO, vs. NEW JERSEY EXPORT MARINE CARPENTERS, INC., et ano

Ward

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
Dec.18-72	Filed Interrogatories.
Dec.18-72	Filed Answer of deft-3rd pty.pltf. New Jersey Export Marine Carpenters, Inc. to cross-complaint of 3 ft. Companhia de Navegacao Maritima, Netumar.
Dec.18-72	Filed Notice of Deposition of Cia De Nav. Mar Netumar.by a first mate,etc.
Jan 4.73	Filed Affidavit in opposition to motion by dft. & 3rd party pltff. on Interrogs.
Jan 11.72	Filed Summons & marshals ret. Served Hudson Cement Corp. on 1/2/73.
Jan 12.73	Filed Pltffs. Notice of taking deposition upon dft. & 3rd pty pltff. Cia De Nav Mar Netumar.
Jan 12.73	Filed Pltffs. Supplementary request to produce of Dft. & third pty pltff. Cia De Nav Mar Netumar.
Jan 12.73	Filed Pltffs. Supplementary request to produce of Dft. & third pty pltff. New Jersey Export Marine Carpenters Inc.
Feb 13.73	Filed Memo. End. on motion paper dated12/11/72. Dft. & 3rd pty pltff motion for an order dismissing the pltffs. complaint,etc. is granted In the event that pltff. fails to answer interrogs, dft & 3rd pty pltff. may settle an order on notice dismissing pltffs complaint,etc So Ordered Ward J. (M/N)
Apr 2.73	Filed Order Ordered Dft. N.J. Export Marine Carpenters,Inc. shall serve within 10 Days answers to pltff's interrogs. on or before 4/10/73. Also for Dft. CIA DE NAV,MAR,NETUMAR, ETC. Ward J.
Apr 4.73	Filed Dft. Cia De Nav. Mar Netumar's Answers to Pltffs. Interrogs.
Apr 5.73	Filed Answers to Interrogs. of Dft. & 3rd Pyt Pltff. Cia De Nav Mar Netumar by Pltff
Apr 5.73	Filed Answers to Interrogs of Dft. & 3rd pty Pltff. N.J. Export Marine Carpenters Inc. by Pltff.
Apr 12.73	Filed Answers to Interrogs. by Dft. N.J. Export Marine Carpenters Inc.
Apr 13.73	Filed Notice of Motion by pltff. Re. Answer Interrogs. ret. 5/11/73.
Apr 13.73	Filed Memorandum in support of pltffs. motion to compel dft., N.J. export Marine Coppenters.Inc. to give full & Specific Answers to Interrogs.
Apr 17.73	Filed Affidavit in opposition by John J. Wrenn
Apr. 25.73	Filed 3rd pty Dft. Answers to 3rd pty pltff. Interrogs.
Apr 27.73	Filed 3rd pty Dft. Answers to Interrogs. to to 3rd pty pltff. Netumar.
May 11.73	Filed Memo. End. on motion dated 4/13/73. Motion granted as indicated. Ward J.
May 21.73	Filed Answers to Interrogs, by N.J. Export Marine Carpenters to pltffs. interrogs.
Jun 11.73	Filed Pre Trial Memorandum of 3rd pty dft.
Jun 21.73	Filed Pltffs. Pre Trial Order. Ward J.
Oct.25.73	Filed Tri[illegible] corr. [illegible] & 3rd pty pltff. Netumar.
Oct.25.73	Filed Requests to charge of deft. & 3rd pty pltff. Netumar.
Oct 29-73	Jury trial begun
Oct 30 73	Trial continues
Nov 1-73	"
Nov.5.73	Before Judge Ward 10/29/73 Trial begun & continued 10/30/73,11/1/73,11/2/73 to 11/5/73 Jury deliberating Verdict attached 10 days for motions, 5 days to reply.
Nov.9.73	Filed Judgment #73,889. Ordered that pltff. have judgment against deft. Cia De Mar. Netumar in the amtm of $42,000.00.,& that the complaint against the deft. N.J. Export Marine Carpenters Inc., & that the 3rd pty complaint against 3rd pty deft. be and they are dismissed. Clerk. Approved Ward J. (mailed notice)
Nov.20.73	Filed Pltff. Memorandum in opposition to motion by Deft.Netumar,for Judgment N.O.V. on the jury's verdict of negligence,etc.
Nov.20.73	Filed Affidavit in opposition to motion by Deft. Netumar for Judgment N.O.V. on the jury's verdict of negligence,etc. by George J. Duffy.

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DATE	PROCEEDINGS
Nov.26.73	Filed Affidavit in opposition by Albert V. Testa to deft. & 3rd pty pltff. Cia De Nav. Mar. Netumar motion.
Nov.26.73	Filed 3rd Pty Deft. memorandum of law in opposition to the 3rd pty pltffs. motion for g judgment N.O.V.
Nov.26.73	Filed Affidavit in opposition by John J. Wrenn to the ship's motion.
Nov.26.73	Filed Affidavit by Victor S. Cichanowicz in opposition to deft. Netumar for judgment notwithstanding the verdict.
Dec.10.73	Filed Excerpt of Charge ea of the Court. dated 11/5/73. Judge & Jury.
Dec.10.73	Filed Memo. End. on motion dated 11/15/73 by deft. & 3rd pty pltff. Netumar. Motion denied in accordance with memeorandum decision. Ward J.
Dec.10.73	Filed Pltffs Trial Memorandum of Law.
Dec.10.73	Filed Pltffs request to charge.
Dec.10.73	Filed Deft. & 3rd pty pltff. N.J. Export Marine Carpenters Inc. Requests to charge.
Dec.10.73	Filed 3rd pty defts. request to charge. I.T.O.
Dec.10.73	Filed 3rd pty defts additional requests to charge.
Dec.10.73	Filed Memorandum Decision. The shipowners motion for judgment notwithstanding the verd or in the alternative for a new trial , is in all respects denied. Ward J. (mailed notice)
Jan.11.73	Filed Examination before trial of deft. & 3rd pty pltff. New Jersey Export Marine Carpenters Inc. by William Montella dated 1/9/73. (mailed notice)
Jan.11.73	Filed Examination before trial of deft. & 3rd pty pltff Cia.De Nav.Mar.Netumar by Richard A. Piper on 3/22/73 (mailed notice)
Jan.3.74	Filed bill of Costs in the amount of $427.32 against deft.. No appearance in opposition. Clerk.
Jan.8.74	Filed Notice of Appeal from judgment dated 11/7/73.(deft.& 3rd pyt pltff)(mailed notice)
Jan.11.74	Filed Pltffs. Notice of Protective Cross Appeal of judgment filed 11/9/73. (mailed notice)
1-10-74	Notice of Proceeding dated 11-2-73
Feb.14.74	Filed Stip & Order that the time for deft. Cia De Nav.etc. & pltff. to transmite the record to the USCA is extended to 3/15/74. Ward J.
Feb.7.74	Filed transcript of proceedings dated Oct 29,30, 1973 & Nov 1,2,5, 1974
Mar. 7-74	Filed memo. of law submitted on behalf of the deft and 3rd party plaintiff.
Nov. 15-73*	Filed notice of motion and affidavit re: Rule 50(b) by deft.
3-14-74	Letter dated 3-12-74
3-14-74	Filed Stip. Extending time to transmit to USCA

lpd 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

JOAQUIN CONCEICAO,

Plaintiff,

-versus-

NEW JERSEY EXPORT MARINE CARPENTERS, INC., and CIA. DE NAV. MAR. NETUMAR,

Defendants/3rd party Plaintiffs, 71 Civ. 2550

-versus-

INTERNATIONAL TERMINAL OPERATING CO., Inc.,

Third Party Defendant.

----------x

Before:

HON. ROBERT J. WARD,

District Judge,
And a Jury.

New York, N. Y.
October 29, 1973 - 10:30 a.m.

APPEARANCES

BAKER, GARBER, DUFFY & BAKER, Esqs.,
Attorneys for Plaintiff
BY: GEORGE J. DUFFY, Esq., of Counsel.

COPPOLA & D'ONOFRIO, Esqs.,
Attorneys for New Jersey Export
BY: JOHN WRENN, Esq., of Counsel

APPEARANCES (Continued):

CICHANOWICZ & CALLAN, Esq.,
Attorneys for Netumar
BY: VICTOR CICHANOWICZ, Esq., of Counsel

ALEXANDER, ASH, SCHWARTZ & COHEN, Esqs.,
Attorneys for Third Party Defendant
BY: ALBERT V. TESTA, Esq., of Counsel

- - -

(A jury was duly impaneled and sworn.)

(In the courtroom, in the presence of the jury.)

THE COURT: Before you hear from counsel, I'd like to give you some preliminary instructions, particularly in view of the fact that none of you have served as jurors before.

First, let me give you the order in which the case will be presented. Plaintiff will make an opening statement outlining his case. Then, the defendants may--they need not, but they may, probably will--make opening statements outlining their respective cases. The opening statements are not evidence, but are merely to aid you in understanding the significance of evidence when it is presented.

After the opening statements are made, the plaintiff will proceed to introduce evidence. At the conclusion of the plaintiff's evidence, the defendants may, probably will, introduce evidence. Rebuttal evidence may thereafter be intro-

duced as well.

Here you have a number of claims and cross claims. I don't suggest that I discussed all of them in the brief preliminary remarks. The fact that you may not remember that I said something about someone's claim or someone's claim against someone else should not be taken by you as determinative of anything. I was trying to make a very brief outline of a case in which there are, as you can see from the number of counsel, four parties. But, listen very closely throughout to counsel as they describe the case, and then to the evidence as it is presented.

At the conclusion of all the evidence, the attorneys will make closing arguments or summations to you. After the closing arguments, you will be given further instructions from the Court in what we call the charge. And you will deliberate and arrive at your verdict.

You have taken an oath to faithfully perform your duties, and I know you will. Your faithful performance of your duties as jurors is vital to the administration of justice. The law applicable to this case will be given to you in the instructions at the conclusion of the trial. As I noted a few minutes ago, it is your duty to follow all such instructions. It is your duty to follow the facts and to determine them from the evidence and the reason-

able inferences arising from the evidence. And, in so doing, you must not indulge in guesswork or speculation. The evidence which you are to consider will consist of the testimony of witnesses who will be here on the stand and exhibits admitted in evidence. The term "witness" means anyone who testifies in person or by his testimony being read into evidence by what is called deposition. That is, he gave his testimony before and it is read here at the trial. The admission of evidence in court is governed by rules of law.

From time to time, it might be the duties of the attorneys to make objections and my duty as judge to rule on those objections and thus whether you can consider certain evidence. You must not concern yourselves with the objections or the Court's reasons for its rulings. You must not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken. That material is no longer in the case and should not be considered by you in your deliberations.

Opening and closing statements of the attorneys are intended to help you in understanding the evidence and applying the law. But they are not evidence. You must not be influenced in any degree by any personal feeling of sympathy for or prejudice against the party or their counsel. No statement or remark or ruling which I may make during the

presentation of testimony is intended to indicate my opinion as to what the facts are. You are to determine the facts. In this determination, you alone must determine the believability, you must decide the believability of the evidence and its weight and value. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the suit, the relation of the witness to the parties, the inclination of the witness to speak the truth or not, the probability or improbability of the witnesses' statements and all other facts and circumstances in evidence. Thus, you may give the testimony of any witness just such weight and value as you believe the weight of such testimony is entitled to receive.

Until this case is submitted to you for your deliberation, you are not to discuss it among yourselves or with any one or remain in the company of anyone discussing the case. After the case has been submitted to you, you must discuss it only in the jury room when all members of the jury are present.

You are to keep an open mind, and you must not decide any issue in particular until the case is submitted to you for deliberation under the instructions of the Court. Those constitute my preliminary instructions to you.

We are now ready to here the opening state-

ments of counsel. In the first instance, we will turn to Mr. George Duffy, who represents the plaintiff, Mr. Conceicao.

MR. TESTA: If your Honor please, before Mr. Duffy starts, if there are any fact witnesses other than plaintiff, they should be requested to leave the courtroom.

THE COURT: If that request is made, as it has been, Mr. Duffy, if you have any fact witnesses here as distinguished from experts, they may take their places to the witness room in the rear of the courtroom.

(Prospective witnesses left the courtroom.)

MR. DUFFY: If your Honor pleases, ladies and gentlemen of the jury, gentlemen. We are permitted at this time to give you a brief outline of the case to make it a little easier for you to understand what is going on once the testimony starts. I would repeat the caution that Judge Ward has already given you, that what is said by the attorneys in opening or argument or during the course of the trial is not the evidence, it's not the basis on which you will make your factual determination. You will make your factual determination based on what is said in the jury box by the witnesses and what is produced by way of documentary evidence.

With that in mind, you may listen, of course, to what I have to say, but keep in mind that I am not testifying as to a fact. You ultimately will make your own determination

based on the evidence. That also goes for the other counsel here when they speak.

This is a personal injury action by a longshoreman who was hurt while working on a ship. The accident hapened on November 5, 1970, and the plaintiff is my client, Mr. Conceicao. He was working for International Terminal Operating Co., Inc., as a longshoreman aboard the SS MOSQUEIRO, which at that time was docked at Pier 36, East River, which is right near by here.

A loading operation was in progress. We have claimed here for damages for those personal injuries and those claims are first against--and I don't make any selection when I say "first", I just treat them as they are--the two defendants are New Jersey Export Marine Carpenters, Inc., and Cia. de Nav. Mar. Netumar. Netumar Line was the owner of the ship. Those are the two defendants. Plaintiff's case is concerned with those two defendants.

They, in turn, have claims against International Terminal Operating Co., Inc., which is in effect a separate case which is being tried here at the same time. But the plaintiff's case has nothing to do with that aspect of the litigation. You can look at it as essentially two cases from that point of view.

I review that the plaintiff has claims against both

New Jersey Export Marine Carpenters and the ship. The claim against New Jersey Export Marine Carpenters is for negligence in the manner in which they built this pipe bed which was involved in the accident, and also for their breach of warrantyor strict liability, but it did break. We contend that irrespective of the cause of the break, that puts liability on them for these damages.

The claims against the ship, Netumar, are essentially also that they were negligent because they must give the longshoreman a safe place to work, and also that the vessel was unseaworthy. Also, this is a matter for you ultimately to determine based on the, again as I say, the presentation of the defense.

Talking a little bit of facts, again bear in mind that what I say is not evidence. But shipboard occurrences are not every-day matters in your experience. They were loading aboard this ship on the morning of this accident; they were loading a cargo of long pipe, steel pipe. It was quite large and it was to be loaded on the deck of the vessel. It was not going into the hatches of the vessel. And for that purpose, a pipe bed or a cargo fence had been constructed by the carpenters, New Jersey Export Marine Carpenters, alongside of No. 1 Hatch. No. 1 Hatch is the first hatch up towards the bow of the vessel, and in the space alongside the

hatch opening and the railing of the ship, this is where the pipe cargo was being loaded in this wooden crib or framework. The crib was built by the carpenters, New Jersey Export Marine, and then the pipe cargo was loaded aboard, was lifted aboard the ship by the longshoremen, the ITO employees, one of whom was Mr. Conceicao.

After some of this cargo had been put in the pipe bed alongside No. 1 Hatch, Mr. Conceicao was in the process of unhooking the pipes that had been put in there, so that the equipment, the lifting equipment could go off to the lighter to get more pipes, and while doing this, the fence broke. He had been reaching onto the cargo to get a hook and his left leg and foot were caught under one of these pipes as it rolled when the fence broke, and his left foot was rather severely injured in there by this movement of the cargo.

Subsequently, he was taken off the vessel. You will hear testimony concerning how he was brought to Beekman Downtown Hospital. He thereafter lost a considerable period of time from work. The accident happened on November 5, 1970, and he didn't go back to work until the following July of '71. During that time, he would have made earnings which he did not, and based upon his prior earnings for the year when he last worked, 1970, he would have claimed, our claim

is that he would have made over $10,000 for the time he was unable to work. This is one of the bases of our claim here, his loss of earnings. He has also undergone and continues to undergo a considerable amount of pain and suffering. He has returned to work. He's returned to work in a different capacity as a longshoreman. He still has complaints and for those items, and the medical expenditures, we also seek damages, again, against New Jersey Export Marine Carpenters, Inc., either for their negligence or breach of warranty, or against the defendant, Netumar, the ship owner, for its negligence or the unseaworthiness of the vessel or against both on any of the counts.

Of course, just because there are 4 different counts does not mean that there are damages. Damages you will find, assuming you will find liability, are one set of damages and not 4 because there are 4 different causes of action which we plead.

To sum up, I can ask and I can tell by your attention that you already will do so. Your job here is to evaluate the facts. This means working and working hard, listening carefully so that you can make these determinations. All parties seek justice before the Court. Plaintiffs and defendants are entitled to a fair verdict, whether it be for the plaintiff or against the defendant, or vice versa. We all

seek from you jurors the fulfillment of that by making your own careful, workmanlike analysis of the evidence, listening carefully, working, a great deal of work has gone into this case to this point. It's now going to be in your hands and we must ask that you also do an equal amount of work so that the ultimate result will be a fair verdict for the matters that are concerned.

Thank you.

THE COURT: Thank you, Mr. Duffy.

Mr. Wrenn.

MR. WRENN: Thank you very much. Your Honor, Counsel, ladies and gentlemen of the jury. I speak to you jurists only because I am first named, and I represent New Jersey Carpenters.

The Court and Mr. Duffy have given you a general view of what our purpose is, and what we expect of you, so therefore I won't trouble you too much aside from pointing out directly what my position is.

The firm I represent was retained to build a cradle or a bed by the ship. You have heard that it was put on the deck. What they were doing is, the ship was going to bring some long pipes, the pipes I think are about 35 feet long, they are about 18 inches wide, and each one is quite heavy. I think it's in excess of a thousand pounds, I'm not sure.

They were going to take those from a lighter, which would be a small ship next to the big ship, put them on the big ship, tie them up and ship them off somewhere, I don't know where But presumably because they were so big, they couldn't stack up under the deck, so they put them on top of the deck. So, they hired the carpenters to build a bed or cradle. It has wooden sides and a wooden bottom. Then, the longshoremen were also hired by the ship to take the pipes from the lighter and put them on the big ship.

In other words, my job is to build the cradle, I am hired by the ship, and the longshoremen were hired by the ship to take the pipes from one little ship to a bigger ship, if you will, put them in the cradle, and then after they did that, my people were going to come back and secure it. That means just top it, put a topping on and lash it down, etcetera.

My position is that we built the cradle according to the way we were supposed to. We used new lumber, and then the next day the stevedores or longshoremen started to load the pipes into the cradle. We took a deposition of the plaintiff, that means his pretrial discovery, we were allowed to ask the plaintiff questions about how the accident happened, etcetera, so we have a pretty good idea of what the plaintiff is going to say. And he, in turn, was able to examine us, and he knows pretty much what our position is, so there are

no real surprises that I know of. Our position is that we did it according to the way we were supposed to do it, and then that morning the plaintiff was putting the pipes into the cradle and, at some point, one of the pipes shifted, that is what the plaintiff tells us. The whole thing didn't come tumbling down, he says the pipes shifted. That is important, and later on, we will be able to talk to you a little more. But it shifted, it caught the plaintiff's toes, and I think it fractured one or both of his toes of his left foot, I believe.

That is essentially it. And from my perspective, the only thing I want to develop at this point is that we did our job, we finished that part of it that we were supposed to do, and then we were waiting for the stevedores to finish their job, and we were going to put the top on. My position is that this accident, whatever happened, was not caused or contributed to by my people at all.

With that, I would ask you to listen to the other attorneys and keep an open mind until you hear all of the evidence and, at the end, we will have a chance to talk to you again.

Thank you, ladies and gentlemen.

THE COURT: Thank you, Mr. Wrenn.

Mr. Cichanowicz.

MR. CICHANOWICZ: May it please the Court, gentlemen, Mr. Foreman, ladies and gentlemen of the jury.

I represent the ship owner in this case where the work was going on at the time that the plaintiff sustained an accident. I think, as you listened to Mr. Duffy and you listened to Mr. Wrenn outline their respective positions, while there is a claim against the ship owner for damages, it does not involve ship's equipment nor does it involve acts on the part of the ship's crew. It does involve, of course, a bed, a pipe bed which was constructed on board the ship. But this was constructed by New Jersey Export, and the work of loading the pipe into the bed was done by International Terminal Operating Co. So that basically what you have here insofar as the ship owner is concerned is a claim for damages based upon something that was constructed by New Jersey Export, and I think from what Mr. Wrenn indicated, possibly something that may have resulted from conduct on the part of the longshoremen. This is what the case appears as far as the ship owner is concerned. But, at this time, I ask you to listen to the evidence and take from the witnesses the testimony as to what happened here, why it happened, and I think that after you have heard that, you should be able to resolve the issues here.

Insofar as the ship owner is concerned, we do

have claims over against New Jersey Export and International Terminal, and that is something which, of course, basically is a legal matter which the Judge will define to you when you get to that point in the case.

But, I will just say, generally, under the law, we do have a right to make claims over against other parties if we are held liable because of some conduct or because of something they have done on board a ship. That is basically the nature of the claim over.

Thank you.

THE COURT: Thank you very much, Mr. Cichanowicz.

Mr. Testa.

MR. TESTA: Your Honor, Mr. Duffy, Mr. Wrenn, Mr. Cichanowicz, and ladies and gentlemen of the jury.

I represent International Terminal Operating Co., Inc., the third party defendant in this case. The third party defendant is different than being a defendant. As Mr. Duffy told you, he is only suing the ship owner, Netumar Lines, and New Jersey Export Marine Carpenters, on behalf of Mr. Conceicao. Mr. Conceicao is not making any claim against my client, International Terminal Operating Co., Inc. He was working for ITO at the time this accident happened. He is solely and only suing Netumar Lines and New Jersey Export Marine Carpenters for damages for personal

injuries that he says he sustained on November 5, 1970 aboard the SS MOSQUEIRO. He is suing these two defendants on theories of negligence and breach of warranty. He is suing New Jersey Marine Carpenters on the theory that they were negligent in making this pipe bed in which the pipes were going to be stowed for this voyage. He said you are negligent, you didn't make that pipe bed properly, so it broke.

He is also suing them for breach of warranty.

He is also suing the ship owner for negligence and breach of warranty.

So, you have two cases right there. Case No. 1 by Mr. Duffy against New Jersey Marine Export Lines; Case No. 1 by Mr. Conceicao against the ship owner, Netumar.

You also have claims by the carpenter and the ship owner against each other. Each one is saying we were not negligent, we did not breach any warranties. We are not responsible for Mr. Conceicao's injuries. But if by any chance you ladies and gentlemen of the jury should decide that we were negligent, we did breach some warranty or duty that we owned Mr. Conceicao, and we are responsible for his accident or his injuries, then we'd like to shift that responsibility.

First of all, we'd like to shift it to each other. Each one is pointing the finger at the other. If the jury

decides in favor of Mr. Conceicao against me, it's your fault. So, they have claims against each other. I would refer to these claims as claims No. 3 and 4. So, it's not as simple as it looks on the face of it.

You have two claims by Mr. Conceicao, and you have claims 3 and 4 by Netumar against New Jersey Marine Export Lines and a claim by New Jersey Carpenters against the ship owner. And they are saying we are not at fault or responsible for this accident, but if you decide we are, we'd like to shift this responsibility some place, any place. Just as long as we get out from under. But they don't stop there.

They have claims 5 and 6 against my client and they are saying we weren't negligent, we didn't breach any warranty, but if you decide we were negligent, we did breach some warranty and we are responsible, then we'd like to shift this responsibility to ITO. If we can't shift it to each other, then we'd like to shift it to ITO. We'd like to say that they are responsible. I say to you on behalf of my client, first of all, ITO shouldn't even be in this case. But we are here, I'm here and I intend to defend this--

MR. WRENN: Your Honor, I object to Mr. Testa at this time arguing. I think he is stepping outside the bounds of an opening statement.

THE COURT: The jury will regard the opening state-

ment as argument. The statements are not evidence. I suggest they are intended to give you an outline of who the parties are and what the overall facts are. And if you just accept it for what it is, that this is an argument of counsel, I think it will work out. I'm sure Mr. Testa will not go on at any length into legal argument. The point I am making now is, you are now finding out who is here and what the claims are. If you proceed on that basis, it will be good for everybody.

MR. TESTA: In the same manner that Mr. Conceicao could bring a lawsuit as he did against New Jersey Marine Export Carpenters, and the ship owner, they, too, had a right to bring my client into this base. But that doesn't mean there is any merit to it. We had a contract to load pipe onto that ship, and we performed that contract right up to the letter. And we performed the stevedoring work in a workmanlike manner. That was our obligation in this case, to take the pipes off this lighter and put them in this pipe bed. If anything happened to Mr. Conceicao because that pipe bed broke, it's not our fault, it's not our responsibility. This is the point I want to get across to you now, that it's our position in this case that we did not breach our contract, that we did perform the stevedoring services in a workmanlike manner.

If you ladies and gentlemen decide that Mr. Conceicao is entitled to some money from either of these defendants, neither one of them is entitled to get that money from my client because we did not do or fail to do anything which in any way caused or contributed to the happening of this accident. I say to you that ITO was not responsible for any condition which might have caused this accident and for these reasons, we are not responsible, and they are not entitled to what we call indemnity, which means they are not entitled to get back any money that you may award Mr. Conceicao, from my client. These are really all the issues in the case. Actually, you have 6 different claims being made here. You have two claims by Mr. Conceicao against each of the defendants. You have claims by each of the defendants against each other, and claims by the defendants against my client. This is what you are going to have to resolve.

I ask you ladies and gentlemen to listen carefully to the testimony. You heard Mr. Duffy say what his claim is. Listen to what the witnesses say. Listen to Mr. Conceicao when he tells you how this accident happened. Listen to the other witnesses. And you decide for yourselves where the fault or responsibility lies, if any, for Mr. Conceicao's accident, and for the injuries that he says he sustained on November 5, 1970. At this point, I just ask you to keep an

open mind. Don't form any conclusions now because of anything that any one of us said to you, because we are all advocates and we are here to do a job for a client. But I just want to point out to you that there is such a thing as the burden of proof.

Mr. Conceicao has the burden of proving his claims against these two defendants. They have the burden of proof on their claims against each other and against my client. And I ask you when you are listening to the witnesses, ask yourselves whether or not they have sustained this burden of proof. But, at the end of the case, we get to come back to you again and talk to you in summation, and at that time we each have the privilege of telling what we think the testimony has shown. Of course, in the final analysis, it's for you to decide exactly where the truth of the matter lies.

Thank you.

THE COURT: Thank you, Mr. Testa.

One final thing before we begin the presentation of the proof. All of your information about this case, how it took place, will occur here in this courtroom and on the stand. You heard an indication by counsel and by the Court that this accident happened while the ship was docked at Pier 36 East River, New York, New York. Pier 36 is rather close to this courthouse. Today's weather is rather inclement, and

I don't expect anybody to go walking around at lunchtime, but my point to you is, do not make it your business either now or at any time during the course of this trial to go over and visit Pier 36. It's something that we prefer that jurors not do. They should not go and have a look for themselves so that if you should be in the vicinity of Pier 36, either coming or going from this courthouse, please don't stop by and have a look.

Aside from that, I think you have now heard the opening statements of all counsel. We are now going to proceed with the case itself by hearing from witnesses, listening to testimony and seeing exhibits.

You may proceed, Mr. Duffy.

MR. DUFFY: Thank you, your Honor.

Mr. Conceicao, would you please take the stand.

J O A Q U I N C O N C E I C A O, the plaintiff called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUFFY:

Q Mr. Conceicao, I ask that you keep your voice up so that we can all hear your answers, please.

Where do you reside, sir? What is your home?

A 2424 Beaumont Avenue, Bronx.

Q How long have you lived there?

A 19 years.

Q How old are you, sir?

A 60 years.

Q Where were you born?

A In portugal.

Q Are you a citizen of the United States?

A Yes, sir.

Q When were you naturalized, sir?

A 1968.

Q What is your job? What work do you do?

A Longshore.

Q How long have you been a longshoreman?

A Since March 2, 1952.

Q Where have you been working as a longshoreman in recent years?

A For different companies.

Q At what location?

A Pier 36 East River, and Pier 42.

Q Are you in what is called a regular gang over there?

A Yes, sir.

Q How long have you been in that regular gang?

A About 7 years.

Q Who is the hatch boss for that gang?

A Mr. Ratliff, James Ratliff.

Q On November 5th, 1970, what company were you working for?

A ITO.

Q That is International Terminal Operating Co., Inc.?

A Right.

Q Where were you working for them that day?

A Where I work before that day?

Q No, that day.

A For the same company. I work on deck.

Q Was it at Pier 36?

A Pier 36, south side.

Q Were you working on a ship that day?

A On deck on a ship, yes.

Q What was the name of the ship, sir?

A Mosqueiro.

Q What time did you start work that day?

A 8 o'clock in the morning.

Q Generally, what were you and the other members of your gang doing that day?

A Loading pipes.

Q What time did your accident take place, approximately?

A About 10 or a little after 10, around 10 o'clock, over 10 o'clock.

Q That is in the morning?

A In the morning, yes, sir.

Q Up until the time of your accident, where had you been working on the ship?

A On the time--

Q From 8 o'clock in the morning until about 10 o'clock when you had your accident, where were you working on the ship?

A On deck.

Q Near what hatch?

A Hatch No. 1.

Q Was the hatch at the extreme forward end of the ship?

A Yes.

Q You said you were loading pipe?

A Yes, sir.

Q Can you describe for me what this pipe was like?

A How heavy it is?

Q All right, how heavy is it, if you know?

THE COURT: How long is it?

A About 30 feet long, about 1800 pounds each. We load two at a time.

Q How did you load two at a time? Take it step by step, please.

A Yes.

Q Where was the pipe before you loaded it?

A On a lighter offshore.

Q That is like a barge--

A Yes, a barge. But we call it a lighter.

Q When you say offshore, that is away from the pier, is that correct?

A No, we load the pipes in shore.

Q On the ship?

A On the ship. Inshore side because the ship is offshore south side of the pier, and we load them towards the pier inshore.

THE COURT: Let me just ask a question for clarification.

You had the pier and the ship was lying to the south side of the pier?

THE WITNESS: On the south side of the pier because the pier comes all the way down, and you got a thing all the way down the pier, you can't dock another ship there facing the highway.

THE COURT: Was the lighter on the outside or between the ship and the pier?

THE WITNESS: The ship is next to the pier and the lighter is next to the ship, outside, offshore side.

THE COURT: Thank you. I think the jury can understand how the physical set-up existed at that time, and we can

continue. Thank you, Mr. Conceicao.

THE WITNESS: I'm sorry if I make a mistake because my English is very poor.

THE COURT: That's all right. You just answer the questions as best you can. From time to time, the Court may ask a few questions, if I don't understand the set-up.

Q How were the pipes taken from the lighter offshore and put on the ship inshore?

A They got the ship winch and we call them bridles, each side you got two hooks. And they hook up one hook on each end of the pipe, and then he brought two at a time on deck.

Q Where were these pipes being put on deck?

A On the main deck. On the floor. We started on the floor.

Q Was there something built there at the deck where the pipes were being stowed?

A Yes.

Q Would you describe that for us, please?

A You got the crate made by the carpenters, the crate both sides. He put the pipes in between the crate.

Q What word are you using, sir?

A Crate. You got 4x4's standing up on both side, and he put the pipe in between that.

Q You said they were brought aboard by the ship's winches?

A Pardon me?

Q You said they were carried aboard by the ship's winches?

A Yes, he put them in on the ship's winch.

Q How many men were there of you on deck loading those pipes?

A Should be 8 men, 4 on each side.

Q Who was running the winches? Were they also ITO longshoremen?

A Yes, they are all longshoremen.

Q Can you tell us, sir, before your accident took place, how much pipe had been brought aboard the ship, if you know?

A I don't know exactly how many pipes he got. We started one floor and then started on the top, it goes all the way up. Unfortunately, the last draft is supposed to go on that side.

Q The last draft is when your accident happened?

A Yes. That's supposed to be the last two pipes.

Q What were you doing just immediately before your accident?

A They land the pipes and I tried to reach, unhook the pipes. I take one hook, one I tried to reach and the next one

the pipes move, and I got crushed on my foot, leg, and then I don't know much what goes on because I pull the foot out and scream.

Q These are the last two pipes, is that correct?

A Supposed to go the last two pipes on that particular place.

Q Then you unhooked one pipe?

A Yes.

Q How were you standing when you unhooked that pipe?

A I climb on the pipes, put my left foot in between and I tried to reach to my end. And then one of the 2x4's or 4x4's broke up. The pipes moved and I got crushed.

Q When you were unhooking, when you unhooked that first pipe, were both pipes laying down on the other pipes?

A Yes.

Q And had they slacked off on the fall?

A They slacked off on the fall, and then I take one hoc'--I'm supposed to take one at a time, but the other one I could have made it.

THE COURT: I'd like to hear the whole answer.

(Record read.)

A One I tried to reach, that is the time they broke, the uprights broke and the pipes moved, I got crushed.

Q These uprights that you are talking about that broke,

do you know who built them?

A The carpenters.

Q Did ITO build those?

A No, sir.

Q Can you describe, a little clearer or a little better what happened to the pipes after they rolled, and what happened to you?

A I started screaming. Somebody grabbed me by the back, and he held me until they released the pipes. They hook up the right pipes to get me loose; took about 10 minutes to do that. I was under the pipes with my foot and my leg.

Q Then what happened after they moved the pipes and got you out?

A Then, I don't know. They take me on a pallet, take me to the garage. And then comes the ambulance and take me to Beekman Hospital.

Q When you say a pallet, is this like a large flat tray to move cargo?

A Yes. We call them a pallet. They put me on a stand, laid me on a pallet. They bring me inshore and take me to the garage, wait until the ambulance comes.

Q Did they lower you off the ship on this pallet?

A Yes.

Q What part or parts of your body were hurt when this

pipe rolled on you?

A My toes, foot and bottom leg.

THE COURT: Which leg?

THE WITNESS: Left leg, and left foot, sir.

THE COURT: Thank you.

THE WITNESS: You are welcome.

Q What portion of your leg or foot was under the pipe for that 10 minutes while they were working to free you?

A I got all the foot from the leg under the pipe.

Q Can you tell us what you felt during those 10 minutes that the pipe was on your leg?

A I felt a lot of pain.

Q Where was the pain?

A It was on my foot and my leg and my toes.

Q During this 10 minutes you say your foot was under the pipe, you said somebody was holding you?

A Yes.

Q Who was that?

A James Head.

Q Where was he standing as he was holding you, if you remember?

A He was standing on the deck, the top deck, They were holding me by my back.

Q When your left foot was caught in those pipes, where

was your right foot?

A In the air.

Q And then Mr. Head held you until they got you out and moved the pipes?

A Right.

Q Then you were taken by ambulance to Beekman Downtown Hospital?

A Yes, sir.

Q What was done for you at the hospital?

A Take X-rays, and then they put some band around the toes, and they put a long, long band all the way up. Then they hold my foot and part of my leg, and he give me a set of crutches.

Q Was any part of your foot or leg bleeding?

A Yes, the toes and the leg on the bottom.

Q The bottom of your leg was also bleeding?

A Yes, a splash.

Q How about your toenails?

A Oh, they are lost. I lost.

Q Did you stay at the hospital?

A Send me home and go back the next day.

Q How did you get home?

A I get a cab from the hospital to Pier 36. And then somebody take me and my car to my house.

had wanted to inquire about those. How do we stand on that offer at the moment, gentlemen?

MR. WRENN: I have no objection.

MR. CICHANOWICZ: I have no objection.

THE COURT: Thank you.

Those will be received as Plaintiff's Exhibits 1 and 2 in evidence.

Thank you, gentlemen.

XXX (Plaintiff's Exhibits 1 and 2 were received in evidence.)

THE COURT: You may proceed, Mr. Duffy.

DIRECT EXAMINATION

CONTINUED BY MR. DUFFY:

Q Mr. Conceicao, during those 8 months that you were unable to work, so far as you know, did your gang work regularly during that time?

A My gang, yes.

MR. DUFFY: That is all I have, your Honor.

THE COURT: Thank you, Mr. Duffy.

Mr. Wrenn will now proceed with cross examination.

CROSS EXAMINATION

BY MR. WRENN:

Q Sir, you never at any time before this accident saw any of that cradle broken, did you?

A Pardon me?

Q Did you at any time before you had an accident see any part of the cradle broken?

A No, sir.

Q Did you at any time after you had the accident see any part of the cradle broken?

A After the accident, I don't see either. They take me into the hospital. I don't see nothing.

Q So you never saw any broken cradle before the accident nor after the accident, isn't that correct?

A Right.

Q What is a winch man?

A A winch man?

Q Right.

A That particular day we have one extra man, I don't know his name.

THE COURT: No, I think Mr. Wrenn wanted you to tell us what a winch man does, is that right, Mr. Wrenn?

THE WITNESS: I'm sorry.

THE COURT: Just tell the jury what the duties of a winch man are. What does he do?

A They land the draft, one will slack the guy, then his one hook. He go on the lighter or the barge, as you call them, to get another draft.

Q As of November 5th, 1970, you worked for ITO, but that is a job where you shape up, is that right?

A No, sir. I work in a regular gang.

Q In other words, you may work in a regular gang but theoretically, it is in itself a shape up job, is what I am trying to develop.

A No shape up job for me.

Q At any rate, at the time you had a group of people you called a gang that worked at Pier 36, is that right?

A Right.

Q On that particular day, the regular winchman was not there, is that right?

A You got a regular winchman, one, but he got an extra man on the winch at that time.

Q That man was not part of your regular gang, is that right?

A No, sir.

Q Do you know his name?

A No.

Q Do you know if he worked there the day before?

A I don't see him there in my gang.

Q As far as you know he only worked that one day, is that what you are saying?

A That particular day.

Q As far as you know?

A As far as I know, sir.

Q I think you told your attorney that you were putting pipe into this cradle near Hatch No. 1, is that right?

A Yes.

Q And Hatch No. 1 is towards the front of the ship, is that right?

A Right.

Q Where was the lighter?

A On the south side of the ship.

Q Where was the lighter with regard to Hatch No. 1? Was it forward of Hatch No. 1 or aft of Hatch No. 1? Do you follow my question?

A Right next to the No. 1 Hatch, the lighter. Right next to the No. 1 Hatch, offshore.

Q So we have the lighter here, the ship you are loading here and the pier here, is that the idea?

A Right. The ship is faced the highway and the lighter the same way. And the pier is on the right side.

Q They all faced the water, is that what you are saying?

A Pardon me?

Q They were all facing the water?

A The highway, sir.

THE COURT: He said the ship was docked bow in. That is the way I understood his description, right?

THE WITNESS: Yes, sir.

Q And the lighter was faced bow in, also?

A Yes, sir.

Q Do you know how many pipes were aboard the lighter that had to be taken off?

A Oh, that I don't know.

Q Did they use a winch aboard the lighter or was the winch aboard the ship?

A The winch from the ship. The lighter you have no winch.

Q Where was the winch aboard the ship located with regard to Hatch No. 1?

A On the platform above the hatch.

Q Was it forward of Hatch No. 1 or aft of Hatch No. 1?

A To the back of the ship, not to the front.

Q It was behind Hatch No. 1?

A Right.

Q Is that what you are saying?

A Yes.

Q About how far was the winch from the bottom of Hatch No. 1?

A How far from the bottom?

Q Or the aft of Hatch No. 1?

A The platform they face even at the hatch, almost. The platform of the winch. The winch is here, the platform is down there.

Q Were you standing on the hatch?

A On the top of the hatch, I was standing.

Q Were you standing there from 8 o'clock until 10 o'clock?

A No, sir.

Q When did you first stand on Hatch No. 1?

A On the front.

Q What time?

A What time? From 8 o'clock until they put the pipes aboard the top of the hatch.

Q Until the accident happened, were you standing on Hatch No. 1?

A Yes.

Q What kind of a day was it?

A What kind of a day?

Q Was it a nice day?

A Pretty good day.

Q Was it windy?

A No, sir.

Q Would you tell us who loaded the pipe onto the winch

on the lighter? Were they people from ITO or were they people from the lighter?

A The people from ITO.

Q And then a man working for ITO operated the winch, is that right?

A The gang from the gang, is the same gang. They got dockmen, holdmen and winchmen.

Q Somebody from ITO operated the winch that took the pipes from the lighter and put it on to the deck of the ship, is that right?

A Right.

Q When you went to work aboard the ship that morning, were there any pipes at all in that cradle?

A No, sir.

Q Was the cradle completed? In other words, were the carpenters working on it or had they finished?

A No, sir, they had completed.

Q You worked aboard that ship the day before, is that right?

A I think so.

Q Did you see the carpenters the day before, making the cradle?

A I don't see it because I was down the hold. They on deck working.

Q Did you ever see the carpenters making the cradle the day before?

A Just when I come up 12 o'clock I see what have they got down, that is all.

Q What time did you leave the day before?

A That I don't remember.

Q What time do you usually quit, 3, 4?

A 5 o'clock. Regular days, work is 5 o'clock.

Q When you left at 5 o'clock the day before, did you see the cradle when you were leaving?

A Yes, I see the cradle.

Q Was it finished?

A Yes, it's finished.

Q Did anybody work on the ship from 5 o'clock until 8 o'clock the next morning?

A I don't think.

Q When you got--what time did you actually begin to work? Did you begin to work at 8 o'clock or did you report to work at 8 o'clock?

A We begin to work at 8 o'clock. They call the gang 5, 10 minutes before 8 o'clock.

Q So 8 o'clock you were aboard the ship ready to work, is that right?

A About right.

Q Did you, from the time that you first started to work until the time of the accident, were you working in the same position, in the same area?

A Not in the same position.

Q When you first started to work that morning, where were you working with regard to this cradle?

A I work right in the front. Not on the top of the hatch, right in the front because when he land the first couple of lengths of pipe, it's low. Then they started going up and up. When it's to be the last two pipes, that is the time I was on the top of the hatch.

Q How tall are you, sir?

A Five-one or five-two.

Q About how much do you weigh?

A Right now, maybe I weigh more, but around 175, something like that.

Q What you are saying is that when they first started to put the pipes down, you were standing on the deck, but then as it got a little higher you stood on the hatch, is that it?

A We work right on the front of the pipes. They land the pipes there, they got men back and men on the front unhook. Not the same men unhook the pipes all the time. One man unhook and the others stand by. We relieve each other when it's a job like that.

Q Will you describe what the pipe, the position of the pipe as it came from the lighter and went into the cradle, what did you see? In other words, describe what you saw when you saw the winch taking the pipe from the lighter across the ship into the cradle.

A Right.

Q How many pipes did they bring at one time?

A Two.

Q What was the highest they raised those pipes?

A The highest they need. They take them from the lighter all the way up until they reach above the hatch and they land them, he land them right in the place, because the winchman he rig the winch, he got 2 falls. They rig it to land the drafts right in the place they want to land it.

Q When they were coming from the lighter and going towards the bed, did they pass right over your heard?

A We stay over the side. We don't stay under the pipes when it comes. We don't stay under. We stay away from it.

Q But they did go above you, put it that way?

A Sure, they going above us if we stay away.

Q How high above you were the pipes when they both cross?

A I don't know how high. They can take it 8, 10 feet, 3, 4 feet. Whatever they need it, they go as high as they

need it. The winchmen judge themselves how high they got to go.

Q On this day, can you tell us when the pipes went above you, heading towards the cradle, about how high they were?

A I don't know. 6, 10 feet. I don't know how high they go.

THE COURT: Was that above the deck or above your head?

THE WITNESS: Above the deck. See, they--excuse me. They coming high. When they reach the place they land, you know, nice and easy to the place they want to land the cargo, the pipes. Then he come down. That is the winchman's choice. We got nothing to do with that. We stand by until he land it and then our job, unhook the pipes.

Q As the pipes went across over your head, was anybody holding on to them with tie lines or anything of that sort?

A No, sir.

Q Were you there when they placed the first pipe into place?

A I was there, yes, sir.

Q So, from that time to the time you had your accident, you were always right there, is that right?

A Not always. Like I tell you before, sir--

Q Where did you go?

A Stand by, but I don't do the job by myself all the time.

Q I understand. But you were present--

A Sure, I stay near there.

THE COURT: You were near the No. 1 Hatch at all times?

THE WITNESS: Sure, all the time.

Q As you were working there, were you facing towards the shore?

A When I work there?

Q When you were working, were you facing inshore or offshore?

A I facing inshore.

Q So the pipes were coming from behind you from the lighter, is that right?

A Right.

Q And over your head, right?

A Not over my head because I stay on the side.

Q Did you, when they were bringing the pipes from the lighter, did you walk out of the way?

A I don't stay in the middle of the hatch. I stay out of the way, and I want the pipes going over my head. You never know what happen.

Q The first set of pipes, they brought in 2 pipes together, right?

A Yes, sir.

Q Were they placed, those first two pipes, if you would, in the bed?

A They place it against the fence inshore side.

Q Were those pipes, when they were placed in the position they were running forward and aft--

A Fore and aft, yes.

Q From the front of the ship to the back?

A Right.

Q Not across the ship?

A No, not across the ship, no, sir.

Q When the first set of pipes was being placed into the bed, did the winchman lower them all the way to the deck and put them on the deck?

A Right.

Q And did anybody from ITO touch those pipes before they got to the deck?

A Nobody touch them till they come right to the deck.

Q Then when they touched the deck, then it was the job of the fellows to

A Sometimes they hold it a little bit to land them close to the place, especially the first ones.

Q Close to what?

A Close to the fence.

Q What's the fence made out of?

A Made up of the wood.

Q That is the bed we have been talking about, the cradle, right?

A Yes.

Q In other words, the first two you want to get up against the cradle, is that right?

A Yes.

Q And you don't touch it with your hands until the winchman has placed it, laid it on the deck inside the cradle, is that right?

A That is when we--sometimes we have to hold it a little bit to go close to make the pipes land close to the crate, the end of the crate.

Q Did you see any one of those first two pipes hit the cradle?

A They no hit them.

Q Did you see them hit?

A They no hit them. I no see them hit.

Q Were you the one who was unloading the first two pipes or was somebody else doing that?

A I was there.

Q No, were you the one doing the work?

A You got more doing the work, not just me.

Q You told us before that with some pipes you put them in place and some place somebody else did it. You didn't do it, isn't that right?

A Right.

Q With regard to these two pipes, did you put them in place or did somebody else put them in place?

A Right.

Q Well, who? Did somebody else do it or did you do it?

A Some I do it, some they do it.

THE COURT: The first two.

THE WITNESS: The first ones I was there, I do it.

Q Are you saying that you put the first two into place?

A Yes.

Q Did you have to move them at all to get them into place?

A No, sir.

Q In other words, the winchman put them in perfect place at that time, is that right?

A Put them in perfect place.

Q How did you unhook them from the winch?

A You stay on the front, take the hooks off.

Q Weren't the pipes lying on the deck?

A Yes, the pipes--

Q If the pipes were on the deck, how did you get the ropes off?

A No ropes off, hooks.

Q How did you get the hooks off?

A From the front. Because the pipes, you got to hold right. One hook on each end. All you got to do is take the hooks off.

Q Did you take the hooks off before you touched the pipes?

A Sure I touched the pipes.

Q Did you take the hooks off front?

A You can't took the hook off before you land the draft. You can't.

Q After you took the hooks off, did you move them at all?

A I don't move them at all.

Q Did anybody else move them at all?

A No, sir. We land them right in the place.

Q With the next two, you went through the same procedure, is that right?

A Next to the other two.

Q How many were on the deck before you started a second pile?

A That I don't know. Maybe 7 or 8pipes, I don't know

how many.

Q When you got to the second layer of pipes, were you the one who put the first two against the wooden fence again?

A No, sir.

Q Who did that?

A I don't know.

Q Did you see either one of those pipes bang into the fence?

A I no see no pipes go into the fence.

Q The second layer, where did they put the first pipe? Did they put that between the pipe and the fence, or did they lean that between two pipes?

A Right, right between the two pipes. The pipe is like this, and we put them in between there. (Indicating.)

Q As you go higher, it gets smaller and smaller, right?

A No, it's the same way all the time.

THE COURT: Do you know what a pyramid looks like?

THE WITNESS: Yes, but it's not like that.

Q The third layer, where do they put the first pipe, does that go up against the fence?

A Should be.

Q And the fourth is in the groove again, is that right?

A Yes, sir.

Q Then the fifth is up against the fence again, is that

right?

A Got to be.

Q And the sixth is going in the groove?

A I don't know how many they got.

Q They alternate, isn't that the way they do it?

A Yes.

Q How high had you gone before your accident happened? How many layers are we dealing with?

A That I don't know how many you got.

Q Could you tell me approximately?

A I don't know.

Q The layers were over your head, weren't they?

A Not exactly above my head because I can't reach with my hand--I cannot reach with my hand from the top deck. That is why I have to step because they land them on the middle of the fence.

Q At the time you had your accident, was the pile of pipe 5 feet high, was it less than 5 feet high, or was it more than 5 feet high?

A No, I don't think it's that high.

THE COURT: How high was it?

THE WITNESS: I don't know exactly because they land--I have to climb up to reach to the hooks to unhook. That is when the accident happened. But how high, maybe 5 or

6 feet, I don't know. I cannot remember that anyway.

Q You were not unhooking the pipe. What are you doing? Are you resting? What is the procedure there? In other words, you unhook a pipe and then the next one, somebody else unhooks, is that the way you do it?

A Yes.

Q You take turns?

A Yes, most of the times is like that, you go in turns.

Q You personally would deal with every other pipe and then some other fellow would deal with the pipe in between, is that the way it worked?

A We have 4 men on each end. Not one man is going to unhook all the pipe. Sometimes you stay for a couple of drafts and then other fellows stay. That is the way we work on that particular job.

Q So, sometimes you would maybe do 2 or 3 in a row and then maybe the other would do 2 or 3, is that the idea?

A Right.

Q You worked it out between yourselves, is that how it is?

A Yes.

Q Say the other fellow is doing 2 or 3 of them, what would you do? Could you go for a smoke, or--

A I don't smoke.

Q Could you rest, of what do you do?

A Sure, I rest. I stand by in case they need me for something.

Q To put 2 or 3 loads of pipe, how long would that take?

A Depends how ~~fast~~ they hook up on the lighter.

Q I know, but on that day, could you give us any idea of how long it would take to put 2 or 3 loads on?

A No.

Q Would it take less than a half-hour?

A Sure, it take less than a half-hour.

Q 15 minutes, would you say?

A Less than that. Depend on how ~~fast~~ they go on the lighter.

Q How many winches were operating that day? In other words, while you were unloading the winch up here, were they loading one down there, or did you have to deal with the same winch?

A The No. 1 Hatch only got two winches. They operate that two winches, that's all what they got.

Q As you got nearer the top of this pile, did any people from ITO stand on the pile of pipes when the winch was bringing the pipe in, or did you wait until the winch put the pipe on top of the pipes before you touched it?

A Right.

Q The second part?

A Pardon me?

Q In other words, nobody touched the pipe before the winch operator landed it, is that right?

A Right.

Q What does that mean, land a pipe?

A You put them in the place.

Q In the beginning, the winch operator would land the pipe in place, is that right, and then you fellows would come along and take the hooks off?

A Right.

Q Suppose that pipe wasn't in place, then what did you do?

A We got to pull, push a little bit until it came close to the fence to land. That is why they got four men stand by on each end, to do whatever they need to do.

Q So in the event that you had to push it to get it close to the fence, you'd call over the other fellows and they would help you?

A Didn't have to call because they stand by, sir. They stay near.

Q If you did not have to push the pipe, how many people were needed to unhook it? Was it one on each end?

A At least, you need two on each end--you need one to take two hooks off.

Q In the usual course, it was one on each end of the pipe, is that right?

A But all stand by.

Q I understand that. There are 8 men in your gang, is that right?

A Right.

Q And the 8 men are there all the time?

A Right.

Q And if need be, you can have all 8 of them help if you need it?

A Right.

Q But in the usual course, just to bring in a pipe and unhook it, you have one man on each side, is that right? If it's wrong, tell me. I wasn't there.

A Only need one manfor taking the hooks off, but all the men stand by when they land the pipe.

Q Pipe. With regard to a pipe, that was being placed in the center of the pile, not near the fence, in the center, right?

A Yes, on the center.

Q After the winch operator put that in the center and you didn't have to push it, then all you needed was one man

on each side to take the hooks off, you didn't have to call on the other guys, is that right?

A Yes, sometimes yes.

Q Sometimes no, all right.

With regard to the--this incident that happened to you, where was this pipe--you said it was the last two pipes that were going to be placed on the pile. Where were they being placed? Were they being placed in the center of the pile or--

A Almost in the center of the pile.

Q What color were those pipes?

A Black.

Q Is that raw or was it painted?

A They painted. They brand new.

Q Do you know what they were made of? Were they steel pipes?

A Steel pipes, yes, sir.

Q Were they rough? In other words, were the pipes--were they smooth or were they rough?

A They smooth.

Q Before you had the accident, had you stepped on on these pipes before?

A No, sir.

Q This was the first that you stepped on the pipes?

A Unfortunately, the first, right.

Q Before that, what did you step up on?

A I was, like I tell you, I was in the front for a little while, and then I know this once, I was on the top deck. That is when the accident happened. I have to step in between to reach to the hooks to unhook the pipes.

Q So before that, you didn't have to step up on the pipes because you could reach them just by reaching up, is that right?

A For a little while, I was not even working.

THE COURT: In other words, somebody else was doing it?

THE WITNESS: Yes, somebody else do it. We relieve each other.

Q How long had you not been working?

A I don't know.

Q Are we talking about 15 minutes or a half-hour or an hour or what?

A Not an hour, and not a half-hour. Maybe 15 minutes or 20, I don't know. I don't remember that.

Q So, for 15 or 20 minutes, somebody else had been unhooking the pipes, is that the idea?

A Yes.

Q For the last couple that came in, you were going to

unhook them, is that right? The last two--

A Usually, I am the one who tried to unhook.

Q And in order to do that, you stepped up on the pipes, right?

A Yes.

Q Would you tell us, when you stepped up on the pipes, how far were you from the end of the pipe?

A Not too far.

Q Could you tell us inches or feet or yards?

A It can't be too far because I have to reach on the end of the pipe. I close to the end of the pipe.

Q Could you tell us how far away you were from the end of the pipe when you stepped up, you climbed up the pipe?

A I don't know, maybe a foot, not even a foot. I don't know how far I was. I was right almost in the end of the pipe.

Q The end of the pipe, would that be to your left?

A To my left, right.

Q You said there was a cradle there, is that right?

A Yes.

Q The wooden cradle?

A The wood cradle is on my right side, not on my left side.

Q The edge of the ship was on your left; where was the

cradle to your right, inches or feet away from you?

A I don't know how far it is.

Q Did you touch that wooden cradle at all?

A No, sir.

Q Did you lean on the cradle?

A No, sir.

Q Did your foot touch the cradle?

A No, sir.

Q At any time during the day, did you touch the cradle?

A No, sir.

Q At any time during the day, did you see the pipes touch that cradle?

A No, sir.

Q How many pipes did you have to work up in order to get on the edge? Were you standing on the first pipe or second pipe or third pipe or whatever?

A Think the third pipe, I don't know. Second or third pipe, I don't know.

Q In order to get to that second or third pipe--

A Must be the second pipe because the pipes are not too high.

Q The pipes are about a foot high, is that right?

A Yes.

Q Whether it's the second or third, you put your left

foot on that pipe, is that right?

A Yes.

Q I think you told us before that you leaned over and your right foot was sticking out as you went to unhook that pipe, is that the idea?

A Yes.

Q In order to get up to that pipe, didn't you step on the wooden part of that cradle?

A No, sir.

Q Wasn't there any part of that cradle sticking out on the edge of the pipe there?

A Not on that particular place I step on.

Q Could you see the wooden cradle underneath the pipes?

A You no got nothing underneath the pipes, sir.

Q When you put your left foot between the pipes, how much of an area was there between the pipes for you to put your foot in there?

A I don't know how much of an area I got.

Q How much of your foot could you stick in there?

A I don't know how much.

Q When you put your foot in, wasn't your foot under the pipe that was above it?

A Yes.

Q How much of your foot could you stick in there?

A I don't know. Only enough to hold me, that's all.

Q Before you put your foot in there, did you test the pipes or shake them at all?

A No, sir.

Q You just put your foot right in there?

A Just put the foot in and tried to reach the pipes, like I told you before.

Q And the pipes shifted, is that right?

A Yes.

Q And that is when you caught your foot?

A Yes.

Q I think you said that you were there for about 10 minutes before you could get your foot out, is that right?

A Yes. Maybe more.

Q How did they remove the pipes? Did they get the winch and put it on and take the pipe out of the way so they could get your foot out, is that right?

A Yes. But they got to know how to hook up the right pipes to get me loose.

Q None of those pipes ever rolled down, did they?

A No, because the other end is on them, and it hold that they can move. Otherwise, I wouldn't be here at this time. They will all roll over me.

Q Fortunately, you are here and the only thing that happened is the pipes shifted, none of them rolled down, is that right?

A No, they no rolled down.

Q Did you look at the cradle or the bed before you began to work that day?

A Pardon?

Q Did you look at the cradle, the wooden cradle before you began to work that day?

A I don't look at that. We don't--we got nothing to do with the crate. We don't make it. The crate is made. We just start to work on it.

Q But did you look at it?

A We are not inspectors to inspect that whether it's made or not. I am not a carpenter.

Q I am saying before you began to work that day, you had to wait a few minutes before they brought the pipe from the lighter to where you are going to place the pipe, right? Did you look at the cradle?

A No, sir.

Q Could you tell me how wide the cradle was?

A I don't know. It's about 8 foot.

Q Can you tell me how long it was?

A That I don't know exactly. How wide I know more or

* * * *

Q And other than this period of time that you were out from November 5, 1970 until July 6, 1971, you have been working in the same gang?

A No, sir. I don't work no place.

Q No, other than that period of time when you were out from November 5, 1970.

A From 1970 up to July, 1971 I don't work no place.

Q No, Mr. Conceicao, I agree with you. What I am saying to you is that you have worked in the same gang--

A Oh, yes.

Q A number of years now?

A I'm sorry, I misunderstand sometimes.

Q Sorry.

A I'm awfully sorry. Yes, I have been working in the same gang.

THE COURT: That is since July of 1971?

THE WITNESS: Yes, same gang all the time. About 7 years I work in that gang.

MR. CICHANOWICZ: No further questions.

THE COURT: Thank you, Mr. Cichanowicz.

Mr. Testa.

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. Conceicao, what is the date of your birth?

A Pardon?

October 19, 1913.

Q Did you say you were a naturalized citizen?

A Yes, sir.

Q When were you naturalized?

A 1968.

Q 1968?

A September, 1968, I think.

Q To your knowledge, did anybody see this accident happen?

A Any other person.

Q As far as you know, did anybody see your accident happen?

A Yes, sir.

Q Who was that?

A I got some witness there, they see. Mr. James Head, Mr. William Brooks, and my former boss, Mr. Ratliff. And more people there.

Q Did you say before that a crib or cradle or pipe bed, whatever we all it here, was supported by 4x4's?

A 4x4's or 4x6, and they call them uprights, you know. They have all kind of names for that.

Q Could have been a 4x4 or 4x6, is that right?

A Yes, something like that.

THE COURT: How many of them?

THE WITNESS: That I don't know how many they got. I think they got about every 4 feet they got some uprights stand up. That I don't know how much one is from the other.

Q Where were these 4x4's or 4x6's? Where were they located?

A Close to the hatch and close to the coping of the ship.

Q You said close to the hatch and close to the coping; that is the same thing, isn't it?

A I call them the coping of the ship, the end of the ship.

Q You mean the railing?

A The railing of the ship and the coping of the hatch.

Q Somewhere alongside the hatch and somewhere alongside the ship's railing, right?

A Yes.

Q But you don't know how many they were?

A No, sir.

Q Were they at any other place besides the ship's railing and the coping? Were they at any other places other than the hatch coping and the ship's railing?

A No.

MR. TESTA: If your Honor please, I don't know if

this gentleman is a witness.

THE COURT: Does anybody know the gentleman who just arrived in the courtroom?

(Pause.)

MR. TESTA: Thank you very much.

Q Were there any boards on the deck?

A Yes.

Q Were they part of this crib or cradle?

A Yes. They put the boards across the hatch and then we put the pipes like this. The boards go like that and the pipes go like that.

THE COURT: Indicating that the board would be cross-wise on the vessel and the pipes would be lengthwise, is that right?

THE WITNESS: Yes. The board fore and aft, and the pipes burton. We call them burton, just on the bottom.

Q Were these uprights attached to anything? The 4x4's or the 4x 6's, were they attached to anything?

A Yes, they attached the wood from upright to other upright, you got wood across, boards to hold it.

Q Did the carpenters put something there to hold it in place, is that it?

A Yes.

Q What did they place there?

A The boards, like I said, on the 4x4's.

Q I believe I understood you to say before, and correct me if I am wrong, that one or two of those 4x4's broke, is that correct?

A I don't see nothing broke, sir.

Q Did I understand you to say that or not, that one or two 4x4's broke?

A Maybe they broke when the pipe shift, they broke. I think everyone broke, I don't know.

Q Was it one or more than one?

A It's more than one--

MR. WRENN: I object. The witness said he didn't see any broken wood--

THE COURT: I think from what I just heard that the witness misunderstood. I remember his question and answer with you. He has answered the question already. I am going to let that answer stand. Let's proceed with the next question. If you want the answer read back, I will read it back.

MR. WRENN: I would.

THE COURT: Would you read the last question and the witness's answer.

(Record read.)

THE COURT: I will let the answer stand. If you

want to inquire further, you may, at an appropriate time.

Q After that you said that Mr. Head stayed there with you, is that right?

A Yes.

Q Is he one of the witnesses who has come to court for you today?

A Yes.

Q And then the pipes were removed and you were taken to Beekman Hospital?

A Right.

Q After Dr. Suitor treated you, you were then treated by Dr. Tagliagambe until March of 1971 when he told you you could go back to work, is that right?

A Yes.

Q Did you try to go back to work at that time?

A No, sir. I'm not even able to put my shoe on.

Q Did you continue to get treatment?

A My own treatments.

Q Right. You said you saw Dr. Rohner and he gave you some treatment.

A That I saw in January 16, 1971.

Q But you saw Dr. Tagliagambe about 41 or 42 times, I believe you said, all together?

A Yes, sir.

* * * *

Q I believe you said the pipes would pass over the hatch about five or eight feet?

A Yes.

Q Off the top of the hatch, higher than the top of the hatch?

A Right.

Q And that these pipes were then landed nice and easy, is that right?

A Yes, sir.

Q And that these pipes are 36 feet, as they are moving across the ship, there is no way the longshoremen can hold on to them, is there?

A No, sir.

Q They just most across and then they are put down nice and easy, as you say, into the crib?

A Right.

Q When they come down and they rest, as you told Mr. Wrenn, they rest right on the deck, the first pipes rested right on the deck?

A Right on deck. Inside the crate, you know. Inside--

Q Inside of the crib or cradle or pipe bed?

A Yes.

Q They came right down alongside this in the crib and right over in the corner where they were supposed to be, right?

A Right.

Q I believe you also said that the winchman put them perfectly in place, is that right?

A Yes.

MR. WRENN: I object to that. I object to suggesting answers. I don't remember the "perfectly".

THE COURT: He's answered it already. At the same time, it's cross examination, so under the circumstances, I suggest that counsel be guided by what is our practice here. He knows what that is.

MR. TESTA: I'm sorry, your Honor. I didn't hear what you said.

THE COURT: I said I suggest you continue to be guided by good practice, and you know what that is.

Q There is no question that any of these pipes at any time hit the crib, is that right?

A Right.

Q They didn't hit the uprights or any of the cradle, is that right?

A No, sir.

Q And that is what you told Mr. Wrenn when he asked you these questions. And they were not over your head, were they? If they were four feet high, they wouldn't be over your head, would they?

A But I cannot reach--

Q You are 5'1" tall, so they would not be over your head.

A Right.

Q The hooks that were used went into the ends of the pipe, is that right?

A The hooks, yes. On each end of the pipe.

Q These pipes have openings in them at the end, is that right?

A Yes. They hook up on the end of the pipes. One hook on each pipe and they take it out of the winch.

THE COURT: So there would be four hooks.

THE WITNESS: Four hooks.

THE COURT: You had two pipes together and each one had a hook in each end?

THE WITNESS: That is right.

Q Each alone is run to the hook and to the bridle and fall?

A Yes.

Q Those lines are tight when they are coming down, aren't they?

A Yes.

Q In order to unhook them, the winchman has to slacken up, doesn't he?

A Yes.

Q Otherwise, you'd never get the hook out?

A Sure.

Q That is what he did, slackened up so you could take the hook out?

A Yes.

Q And it was at that point that you heard some kind of a noise, you heard something break, and the pipes rolled on your foot?

A No, I don't hear nothing. I feel it when it happened.

Q Did you hear anything?

A I don't hear it. When I tried to reach it, like I tell the gentleman, to reach the second hook to unhook, that is when the pipes shift and it crushed my foot in between the pipes. And after that, I don't know nothing else.

Q Which end of the pipes were you at that point? The forward end or the aft end?

A The forward end, to the front of the ship.

Q That is at the front of the No. 1 Hatch?

A Right.

Q Where the front of the pipes are?

A Right.

Q And at that point, the pipes were about four feet

high, is that right?

A Maybe more, I don't know. About that, maybe more.

MR. TESTA: I have no further questions.

THE COURT: Mr. Duffy, do you have any further questions?

MR. DUFFY: I have no additional questions, your Honor.

THE COURT: Mr. Wrenn, do you have any further questions?

MR. WRENN: Yes, your Honor. I just want to clarify something.

THE COURT: You may.

RECROSS EXAMINATION

BY MR. WRENN:

Q At the time of your accident or right after your accident, did you see uprights that were broken or knocked down?

A When the accident happened?

Q After, at or after.

A Not before the accident happened, I don't see no pipes--no uprights broken.

Q At the time of your accident, or after your accident, did you see any uprights broken?

A I don't see because I was full of pain. I can't see

nothing at that time, sir. In my circumstance, I don't see.

Q At any time immediately before your accident or at the time of your accident, did you hear any cracking or breaking of wood of any kind?

A No, sir.

MR. WRENN: Thank you, sir.

THE COURT: Anything else, gentlemen?

Thank you. You may step down.

(Witness excused.)

THE COURT: I think this would be a good time for us to take our recess.

May I again remind you not to discuss the case among yourselves while in the jury room and to keep an open mind.

(Recess.)

(In the courtroom, in the presence of the jury.)

THE COURT: We will now resume.

Mr. Duffy, would you call your next witness, please.

MR. DUFFY: Mr. Ratliff.

J A M E S R A T L I F F, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUFFY:

Q Mr. Ratliff, where do you live?

A 1915 Morris Avenue, Bronx, New York.

Q What is your job, sir?

A I am a hatch boss on the water front, Pier 36 East River.

Q On November 5th, 1970, were you a hatch boss at Pier 36 in the East River?

A I was.

Q Were you working for ITO at that time?

A I was.

Q What work was your gang doing that morning?

A That morning we was assigned to No. 1 Hatch, and we were told to put pipe on the deck of the ship.

Q During that time, did there come a time when there was an accident involving Mr. Conceicao?

A There was.

Q Mr. Conceicao at that time was working in your gang?

A Yes, he was.

Q Where were you, sir, when the accident happened?

A On the hatch of the No. 1 Hatch.

Q Can you tell us, sir, exactly what you saw happen?

A Well, as I recall, we were bringing in long pipe, about 30 feet long. We were bringing in two at a time. And as we were bringing the pipe in, we were loading it on the deck of the ship in the well, as we call it. And we got up above the hatch and we had the uprights, the carpenters had

built the uprights on the side of the hatch where we could put the pipe into this, I guess like what we call like a bed. And the upright sticks up above the hatch itself. And we were loading the pipes into that.

Q You say, sir, above the hatch. Are you referring to the hatch coaming?

A The hatch coaming, right.

Q Approximately how high off the deck is a hatch coping, or that hatch coaming?

A I'd say approximately four feet. 4 to 5 feet. 3 to 5 feet. I don't remember the exact measurements.

Q When you refer to the hatch covering, this is the hatch coaming, this is the top of the hatch that you open up when you put cargo inside the hatch, is that correct?

A That is correct.

Q At the time of this accident, you were on top of the hatch?

A I was standing on top of the hatch itself.

Q The hatch was closed?

A The hatch was closed, right.

Q What exactly happened?

A Well, as we were putting the pipe on the deck, the-- as we went in to put the pipe on the deck as we come up, we come up against the uprights there was put there by the

carpenters. And the draft went down, she didn't hit anything, but the weight, the uprights broke. And they caught Joaquin's leg, left leg.

Q What happened to the pipes when the uprights broke?

A Well, the pipe spread and rolled and then they caught his leg, his foot, and we had to stop and rehook to get that off his foot.

Q Where was he with reference to the pipe when this happened? At what end of the hatch?

A Well, this was mostly on the forward part of the hatch.

Q And you saw the pipes spread when the upright broke?

A When the upright broke, the pipes spread out.

Q Did they spread out their entire length or how did they spread out?

A No, mostly one end of the pipe spread out.

Q Which end was that?

A I think it was the forward end of the pipe.

Q Why didn't the aft end spread out?

MR. WRENN: I object to that, your Honor. I object to the form of the question.

THE COURT: I will sustain the objection as to form.

Q Did the aft end of the pipes spread out?

A The aft end, by it being so long, the aft end of the pipe was against the house and we have like what we call the

topping boom lift, it sits down there, and that helped stop the pipe from spreading on that particular end.

MR. WRENN: I object to the answer and move to strike it as not being responsive.

THE COURT: Let me hear it, if you would.

(Record read.)

THE COURT: Strike it. Perhaps I could ask the question again.

Did the aft end of the pipe spread and roll?

THE WITNESS: Well, your Honor, the aft end of the pipe, it was longer than, you know, she sits in on the bottom of the well all the way up. And the house, what we call the house, where the winch is set, that end of the pipe would catch against the end, you know, the house part of it. Like where the winch set.

THE COURT: So the deck house held the aft end part of the pipe from spreading and rolling as much as the front?

THE WITNESS: That is right, yes.

Q When the uprights broke, had a draft just been landed?

A The draft had just been landed.

Q What was Mr. Conceicao doing?

A He was in a position where he could unhook the draft.

Q About how long did it take for you to get him out of the pipe?

A Well, I'd say approximately 8 to 10 minutes, because we had to unhook and pick up the pipe that was on his foot.

Q After the accident, did you observe the wooden uprights of the pipe bed?

A I did.

Q Can you tell us what you saw?

A Well, I saw the uprights had broken.

Q At any time during that morning loading, had those uprights been struck by incoming drafts of the pipe cargo?

A No, not to my knowledge.

MR. DUFFY: You may cross examine.

THE COURT: Thank you, Mr. Duffy.

Mr. Wrenn.

CROSS EXAMINATION

BY MR. Wrenn:

Q Mr. Ratliff, you have known the plaintiff for a long period of time, have you?

A I beg your pardon?

Q You have known the plaintiff for a long period of time?

A I have.

Q And you have worked together five days a week for a period of 5 or 6 years or more?

A Well, I won't say we worked together five days a week

every week. No, I wouldn't say that.

Q Over what period of time have you known the plaintiff?

A I have known Joaquin, I'd say about 8 or 9 years, 7 or 8 years, anyway.

Q During that time, has he been in your gang?

A Yes, most of the time.

Q What is the job of a hatch boss, as of November 5th, the date of the accident? What was your function aboard the ship that day?

A Well, my function aboard the ship is to see that the cargo is put on the ship in the proper place where I was told for it to be put.

Q Who told you where to put the cargo?

A The stevedore.

Q Who was that?

A Well, I don't recall the name at the time. We have 3 or 4 different stevedores there. And I don't recall the particular stevedore that was in charge that particular day.

Q How long have you been at Pier 36?

A Since the opening of it, approximately 8 years.

Q How many men were in your gang that day?

A We have a gang of 20 men.

Q What were their names, do you know?

A I can't call their names offhand, but call some

of them nicknames, etcetera.

Q Do you remember what day of the week the accident happened?

A No, I don't remember the day of the week at this time.

Q Do you remember what the weather was like?

A Not to my knowledge.

Q Did you fill out a report, an accident report after this incident?

A I did not.

Q Did you write out any statement of any kind for any one after this accident?

A I did not.

Q Before coming here to testify, did you look at anything to refresh your recollection as to what happened?

A No, I did not.

Q Did you talk to the attorney for the plaintiff at any time before coming here to testify?

A I did.

Q Where did you speak with him?

A Down at the pier.

Q Who did you speak to?

A The attorney--

Q The gentleman right here?

A Right.

Q Mr. Duffy?

A Mr. Duffy.

Q When did you speak to Mr. Duffy about the case, do you know, at the pier?

A Approximately 3 weeks ago, I guess. 2 or 3 weeks ago.

Q Was that the first you spoke to Mr. Duffy about the case?

A It was.

Q Have you ever retained Mr. Duffy or his firm for a case?

A I have not.

Q Have you ever spoken to anyone from Mr. Duffy's firm before 3 weeks ago?

A Well, I spoke to a gentleman, oh, I guess about a year ago, just spoke casually to him.

Q Was he from Mr. Duffy's firm?

A I don't know. I don't know where he was from. He come to my house. And I didn't give him any information whatsoever. I just spoke with him and that was it. I didn't give him any information concerning anything.

Q About what time did this accident take place, do you recall?

A Well, I think it was somewhere between 9:45 and 10 o'clock or a quarter after 10.

Q What time did you personally get aboard the ship that morning?

A Oh, I don't remember just actually what time, but I come in at 8 o'clock in the morning.

Q What was the name of the ship that this accident happened on?

A I think it was the Mosqueiro.

Q Had you worked that ship the day before?

A I don't remember.

Q You said that you personally went aboard the ship about 8 o'clock, is that right?

A I said I checked the gang in at 8 o'clock.

Q I'm sorry.

Where did you check the gang in? On the pier or aboard ship?

A No, on the pier at the timekeeper.

Q What time did you go aboard the ship that day?

A I don't recall. I guess about 8:30 or 20 after 8, because I always stop to see about my cargo, what cargo I am going to put aboard the ship. Approximately 8:20, maybe 8:30 before I get up on the ship.

Q Did they begin to load the ship before you get there,

or do they wait until you get there until they begin to load it?

A No, they began to load the ship whenever they are ready to start. When they get aboard the ship, when they rig up and everything, if everything is proper, then they start to load the ship.

Q When you say everything is proper, is it your job to check and see that everything is proper?

A Well, I have other men that if I'm not there at the time, then he takes over. He makes sure that everything is taken care of.

Q He stands in for you, is that what you are saying?

A Yes.

Q On this particular day, do you know the name of the gentleman who did that on your behalf?

A No, I don't, because we had extra men there that day and some of my deckmen was away at the time. And I don't recall just who was there.

Q Prior to commencing operations with regard to this particular loading, wasn't it your job to take a look at the cradle and the bed to see if everything was in order?

A It's my job to take a look, if I am up there. If I am not there, then I have men to--the stevedore, he is in charge of the operation there.

Q Yes, but you work for the stevedore, don't you?

A That is right.

Q And that was your job or if you weren't available, then you would assign somebody to do that for you, is that the idea?

A That is true.

Q Did you tell someone that day to go aboard the ship and take a look at the bedding to see if everything was in order?

A No, I'm not in charge of the bedding. I'm not in charge of the bedding. Whoever makes the bedding, they are in charge of that bedding.

Q Before you put pipes in there, don't you inspect that bedding?

A Not necessarily.

Q In other words, you don't look at the bedding before you begin to fill it?

A We look at the bedding, yes. But we don't inspect it. We are not inspectors there.

Q Did you see anything broken--

A If we saw anything broken, we wouldn't put anything into it.

Q You wouldn't begin your operations until it was repaired?

A Right. But we didn't see anything broken.

Q We didn't look that day, did we?

A I don't know if anybody else looked.

Q You weren't there at the beginning, were you?

A I wasn't there when it first started.

Q Therefore, you don't know whether anybody looked to see whether any part of that bedding were broken, is that right?

A Before, when it first started, I don't.

Q You said you got there about 8:30 or something?

A I said 20 after, I don't know.

Q Whatever, 20 after, 8:30. At that time, had they put some of the pipe in the bed already?

A There was some in the bed.

Q Do you know where they were taking the pipe from? Where was the pipe?

A From the dock.

Q The pipe was on the dock?

A Yes.

Q How were they getting the pipe from the dock onto the ship?

A With the winch.

Q Who was operating the winch?

A The deckman.

Q The deckman?

A Yes.

Q Would he be on the ship, or would he be on the dock?

A He would be on the ship. The winches are on the ship.

Q Is he an employee of the stevedore?

A Yes, he is.

Q Would he be part of your gang?

A Well, he is an extra man that comes from the hall that is hired from the hall.

Q So he wasn't a regular member of your gang that day?

A No, a fill-in.

Q Do you remember what his name was?

A No, I don't.

Q Were you familiar with his experience at all?

A No, not particular.

Q When you got there, did you look at the bedding? Did you inspect the cradle or the bedding?

MR. TESTA: If your Honor please, this has already been covered. The witness has testified to this.

THE COURT: It's cross examination. I am going to give counsel latitude here. If you can answer that question, I'd appreciate your doing so.

When you got there, did you inspect the bedding or

the cradle or the crib?

THE WITNESS: No, your Honor. The cradle is made by the carpenters, and it's supposed--it's made to be substantial. When we come to put the pipe or whatever the case may be into it, That is supposed to be done by the people that build that. When they build it, it's supposed to be substantial enough to take care of what we put into it.

THE COURT: So, the long and short of it is that when you did arrive on the scene, you did not inspect the bedding yourself?

THE WITNESS: No, sir. I did not.

Q Did you look at the bedding at that time?

A I probably looked at the bedding. I can't say definitely if I went around to look at the bedding, because we were putting pipe into the bed. When we put the pipe into the bed, and the uprights are there, we are assured from the people that make the bed that it's substantial enough to go for what we are putting into the bed, to hold it.

Q Did somebody tell you that, that it was substantial?

A This is a practice of the waterfront, that when they do a job, it's supposed to be substantial.

Q Do you know if they used old lumber or new lumber on this particular bedding?

A I don't know.

Q Do you know how many uprights there were on this particular bedding?

A I don't remember how many uprights there were.

Q Do you know how wide the cradle was?

A I don't.

Q Do you know how long it was?

A No, I do not.

Q Do you know how many pipes had been put in the cradle when you arrived?

A No, I do not.

Q How long were you there before something happened?

A I'd say about maybe an hour, a little over an hour.

Q During that hour, what were you personally doing?

A I was standing, instructing them how to lay the pipe into the bed.

Q How did you instruct them to lay the pipe into the bed?

A Where they would interlock. When the pipe come down, she would interlock.

Q Did you do any of the physical work yourself?

A I did not.

Q How many of your men were actually engaged in putting that pipe into place?

A I have 3 men as holdmen.

Q How were they spread out? Were there 4 on each side of the pipe?

A Probably 4 on each end.

Q Each end?

A Yes.

Q How were the pipes coming? Were they coming in one at a time or two at a time or--

A Two.

Q Each time those pipes came in, how many men engaged in putting it into place and unhook it?

A I can't say how many men because I have 8 men there. I can say if they all was engaged in landing it, I can't recall if 8 were there or maybe 7 or 6 was there. I don't recall.

Q During that period of time, were you also standing on the Hatch No. 1?

A I was standing on Hatch No. 1.

Q For about a hour?

A Maybe, or a little over an hour, before this accident happened.

Q When the accident happened, were you facing inshore or offshore?

A I was facing inshore because we were landing inshore.

Q How high up were the pipes piled at the time of the

accident, do you recall?

A I can't say just how high, but they were just above the coping of the hatch.

Q When you say just above the coping of the hatch, are we taking about inches?

A No, or--

Q Or feet, or whatever?

A I can't say because I didn't move to see how far they were over the hatch. I can't give you a measurement.

Q Could you show us with your hands how far they were over the hatch?

A I would say that they were about--this is the hatch, maybe they were this high above the hatch. The last pipes that were coming in was maybe 1 pipe or 2 pipes above the hatch.

THE COURT: How far was that? Would you hold your hands up?

THE WITNESS: I said maybe it was about that high, maybe 1 pipe, or 2 pipes above the hatch coping.

Q Would you say about 6 to 10 inches?

A I don't know just how high the pipe was in diameter. I don't know whether they were 8, 10, 15 inches high or what. But I'd say they was approximately 2 pipe above the hatch.

Q So, if I understand you correctly, you said the

hatch coping was about 3 or 4 feet above the deck?

A That is what I think. I don't have no measurement.

Q And then the pipes were what you showed us before, 6 to 10 inches above the hatch coping, is that it?

A I'd say about 1 or 2 pipe above the hatch.

Q Were you actually looking at the plaintiff at the time he had the accident, or did the accident call your attention to him?

A I was looking at the landing of the pipe, and that is when the accident happened.

Q Were the pipes still in motion when the accident happened?

A The way I see it, when the pipe was landed, and the uprights broke when the pipe was landed. And then the pipe started to roll. And that is when it caught his foot.

Q In other words, your testimony is that the pipes, by landed, you mean touched the other pipes, is that what you are talking about?

A She interlocked in the center of the bed. The weight of the pipe, the weight went down, well, then the pipe that was against the upright, then she started to spread. They broke and she started to spread.

Q The minute the pipe touched the other pipes, and the pipes started to spread, is that what you are saying?

A Yes.

Q As the pipes were coming down before they touched, where was the plaintiff?

A He was standing on top of the hatch.

Q That would be the same hatch that you were on?

A Right, No. 1 Hatch.

Q As the pipes were coming in, about how far from you was he standing?

A When the pipe is coming in, we all move over to the shore-side of the hatch until the pipe is getting near to landing, for safety precaution. And when the pipe get down a certain distance, then we walk near the pipe.

Q On this particular occasion, how far was the pipe that was coming in from the pipe you are going to put it on, when you started to walk back towards the pipes?

A Well, I don't know. I'd say maybe a foot, a foot and a half from the landing place.

Q And at that point, then, did you walk back on top of Hatch No. 1?

A I was standing on Hatch No. 1 at the time, yes.

Q You moved out of, but at all times you stayed on Hatch No. 1, is that what you are saying?

A I was on Hatch No. 1 all the time.

Q How about the plaintiff? Did he move over also and

did he remain on Hatch No. 1?

A He remained on Hatch No. 1, but he moved over to get into position to unhook the draft.

Q Where did you go after the pipe came close to the other you were going to put it, you walked back towards the area where you were going to load it, is that it?

A Where the pipe was going to be put.

Q How far were you from the pipe at that point?

A Oh, I'd say maybe three feet, four feet.

Q What was between you and the pipe? Were there some wooden stanchions there?

A The uprights.

Q Between the uprights and the coaming, was there any space there?

A The uprights was against the coaming.

Q So there was no space there?

A No, the uprights, they put the uprights, they lay against the coaming.

Q What was the plaintiff standing on when the pipes were about a foot from the other pipes?

A On the hatch cover.

Q Was he also standing on the hatch covers?

A We are always standing on the hatch covers. The hatch is wide, you know.

Q Was the plaintiff standing on the hatch cover when the accident happened?

A Yes.

Q Tell us what you saw happen to the plaintiff as he was standing on the hatch cover.

A When the uprights broke, the pipe rolled and they rolled on the top of the hatch because the pipe was above the hatch. It rolled on the top of the hatch cover.

Q The plaintiff is standing on the hatch cover, the pipes roll loose, they roll along the hatch cover and in so doing, they roll on the plaintiff's foot, is that what you are saying?

A I didn't say they rolled across the hatch cover. They rolled on top of the first hatch cover near the edge, the coping of the hatch.

Q But they did go on top of the hatch cover and hit the plaintiff's foot, that you saw, is that right?

A That I saw.

MR. WRENN: Thank you.

MR. CICHANOWICZ: I have no questions.

THE COURT: Mr. Testa?

MR. TESTA: May I have one second, your Honor?

THE COURT: Yes.

(Pause.)

* * * *

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. Ratliff, you were the hatch boss at Pier 36 on November 5, 1970, is that correct?

A That is correct.

Q And you worked at the No. 1 Hatch on the SS MOSQUEIRO on that date, is that correct?

A That is correct.

Q As I understand your testimony from yesterday, pipes were being loaded onto this vessel?

A They was, yes.

Q Do you know how many pipes were being loaded onto the MOSQUEIRO?

A No, I don't. I don't know how many.

Q I beg your pardon?

A I don't know just how many was being loaded.

Q Do you know how many pipe beds were constructed by the carpenters?

A No, I don't know how many was constructed on that vessel.

Q Do you know whether it was more than one?

A I don't.

Q Was there anybody aboard the ship representing New Jersey Export Marine Carpenters while these pipes were being

put in the pipe bed?

A I think the carpenters was there at the time.

Q Were they telling you anything about where to put the pipes or how to put them?

A No, not at that time.

Q Were they saying anything to you about the business of putting pipes in this pipe bed?

A No, they wasn't saying anything to me.

Q Were they doing anything on November 5, 1970?

A Was they doing anything?

Q Yes, the carpenters.

A Well, they had built the bed for the pipe. That had been done.

Q Do you know when that was done, Mr. Ratliff?

A Well, I don't know what day it was built.

Q Was it done the day before?

A Well, I don't recall if it was done the day before or when it was done. I don't know.

Q But on November 5, 1970, was it all finished?

A Yes.

Q It was?

A Yes.

Q Did you go to the No. 1 Hatch at 8 o'clock in the morning on November 5, 1970?

A I went--I don't say I went there at 8 o'clock sharp. I probably went up about 20 after or something, I don't remember.

Q At the time you went to the No. 1 Hatch, had the operation of putting the pipes in the pipe bed started or were they waiting for you to get there?

A No, they had started.

Q Do you know how many pipes were in the pipe bed when you got there at 8:15 or 8:20?

A No, I don't remember how many was in the bed.

Q Did you look at the pipe bed when you went there at 8:15 or 8:20?

A Well, I went and I stood over by the bed, you know, where they were putting the pipe into the bed.

Q Did it look all right to you?

A Looked all right to me, yes.

Q The uprights on this pipe bed, some of them were alongside the hatch coping and some were alongside the ship's railing, is that right?

A That is right.

Q Will you tell us what the hatch coaming looked like?

A What the hatch coaming looked like?

Q Yes.

A On No. 1 Hatch?

Q Yes.

A Well, it's the top of the hatch itself. It's the top of the hatch itself, where the hatch covers go across.

Q Did it look something like the railing here of the jury box?

A Well, it's steel and that is wood.

Q This is wood, yes, but other than that, did it look something like this?

A Well, it's similar because the hatch boards, they extend from the hatch, from the rail across the beams and-- I couldn't say that it looked like this, because it's a steel rail--

Q I understand, but aside from the fact that that was steel and this is wood, did it look like this rail?

A Well, it looked something like that, but I can't say definitely that it looked like that.

THE COURT: Would you describe the hatch coaming as a low wall made of steel?

THE WITNESS: It's made of steel, your Honor. I don't know how thick, you know, but it's made of steel and it comes up.

THE COURT: Comes straight up?

THE WITNESS: Straight up. Then your hatch boards go with the beams.

THE COURT: Am I correct that the hatch coaming starts at the deck and then it rises up?

THE WITNESS: And it rises up.

THE COURT: How high did the hatch coaming of the MOSQUEIRO stand from the deck?

THE WITNESS: Your Honor, I would say about 3 feet or something like that. I'm not sure now the actual distance, you know, but I'd say approximately 3 feet.

THE COURT: Thank you.

Q How wide is it on the top, the top of the hatch coaming? Is it wide or is it narrow?

A It's narrow.

Q Can you give us any idea with your hands showing what the top looks like?

A I'd say the top of the hatch coaming is about--about the wide, (indicating), the steel, about that wide.

THE COURT: Indicating about 3 to 4 inches.

MR. TESTA: All right.

Q These uprights that were part of the pipe bed were right up alongside the hatch coaming, were they not?

A Yes.

Q Were they taller than the hatch coaming or the same height as the hatch coaming?

A No, they were taller than the hatch coaming.

Q How much taller were they than the hatch coaming?

A I don't know. I can't say how much because I didn't have any measurement of how much over the coaming. I'd say they might stand up about that much over the coaming.

THE COURT: Indicating about a foot and a half, 2 feet.

THE WITNESS: About 2 feet or maybe could be more, your Honor. It could be 2, 3 feet.

Q When the last draft came down at the time of Mr. Conceicao's accident, I believe you said that that pipe was going right in the middle, is that correct?

A Well, I don't say it was going right in the middle. It was being landed, it was landed--we come across, you know, we keep it level in the bed. So, I don't know if it was in the middle or on the--near the coaming, you know.

Q Was it being landed between two pipes so as to fit into the valley or groove made by two pipes?

A That is what you usually do. We interlock it between the two pipes.

THE COURT: It interlocks it between the layer below?

THE WITNESS: Yes.

Q It fits into the space formed by the pipes?

A Yes, sir.

Q Had that pipe been fitted into the space before the

accident?

A Had the pipe been fitted in?

Q Yes.

A It was landed.

Q It was landed right in that space?

A It was landed in the space.

Q Before anything happened?

A Yes, it was landed in the space and the fall was slack on the pipe.

Q What is the reason they slack off on the fall?

A That is when you land the pipe.

Q Yes, but why does the winchman slack off on the fall after the pipe is landed?

A So it can be unhooked.

Q Is that because it is too tight unless it's slackened off?

A When the winchman, when he lands his pipe, the fall becomes slack, where the longshoreman can unhook it.

Q Yes, but before there is slack put in the falls, it is tight, isn't it?

A When the weight is on the fall, it tight.

Q And you couldn't get the hook out when it is tight, is that right?

A That is right.

Q So that you have to slack off in order to get the hook out?

A That is right.

Q I believe you testified that Mr. Conceicao was in a position to unhook the draft?

A That is right.

Q That is after it was landed and after they slacked up, he was then in a position to unhook it. What position was he in, as you saw?

A He was in a position to get to the wire, to unhook the wire from the pipe.

Q Yes, but what position was that, that he was in?

A He was walking towards the pipe to get in the position to take the hooks from out of the pipe.

Q Where was he standing?

A He was standing on the hatch near the edge of the hatch. He was getting, going in to unhook the draft.

Q Was that near the forward end of the pipes?

A That is right.

Q You also testified yesterday that you saw the upright that was broken, is that correct?

A Yes, sir.

Q Which upright was it that you saw that was broken?

A Well, I saw the ones that was on the forward--it was

more than one.

Q More than one?

A I guess it was more than one.

THE COURT: You guess or you know?

THE WITNESS: I know it was more than one, your Honor. I don't know if it was 2 or 3, but it was more than one.

Q Which one was it that you saw?

A Well, on the forward part of the coaming.

Q Was it the one near the hatch coaming or the one near the railing?

A Near the hatch coaming.

Q And it was the one up forward?

A Yes.

Q What did it look like? Was it cracked, split, broken in half, or what?

A It was broken.

Q Can you describe what you mean by the word, "broken"?

A The wood was broken. It just broken and fell down.

Q Was it completely broken in half or just broken like a crack or a split or what?

A No, it was broken off. They were broke up and was lying down on the hatch.

Q Completely separated?

A Yes, sir.

Q From the time that you were there, which was about 8:15 in the morning, until the time this accident happened, I believe you said that at no time during the morning had these uprights been hit by any incoming drafts or pipes, is that right?

A While I was there, that is right.

Q While this loading operation was going on, did anybody from New Jersey Export Marine Carpenters come up to you at any time and make any comments to you about this loading operation?

A They did not. Not to my knowledge.

Q At any time did anybody from New Jersey Export Marine Carpenters make any complaints to you about this pipe loading operation?

A No, they did not.

Q Were they there for the purpose of lashing these pipes, Mr. Ratliff, after you had finished putting them in the pipe bed, if you know.

MR. WRENN: I object to the form of the question.

THE COURT: Sustained as to form.

Q Do you know whether or not the carpenters were going to do the lashing after you finished loading the pipes, Mr. Ratliff?

A I don't remember if the carpenters was doing the lashing. Usually, they do have a wire, a cable that runs under the pipe and extends on each side, and after the pipe is loaded, they put that together and lash it down.

Q After this accident happened, did anybody come along and lash these pipes in the bed?

A I don't remember if they did.

Q Were you there after the accident happened?

A I was.

Q Did the loading operation continue?

A I think we stopped loading there because the uprights had to be installed over, or they lashed it down, I don't remember now.

Q While you were there, did anybody from New Jersey Export Marine Carpenters come and repair that pipe bed?

A I don't remember.

Q Do you recall whether the operation was finished altogether, where the pipes were put in the pipe bed and then lashed into place?

A I don't remember if any more pipe was put there or not, I don't recall.

Q Do you recall if any catwalks were put over the pipes after they had been lashed in place?

A I don't remember.

Q When you came aboard at 8:15, I believe you said yesterday that you didn't see anything broken in this pipe bed, is that right?

A That is right.

Q You also said if there was anything broken you wouldn't have put anything in it?

A That is right.

Q At the time of the accident, I believe you said yesterday that the pipes were about 6 to 10 inches above the hatch coping?

A Well, that is what seemed to me. I remember that the pipe was about 2 high, or it could have been more, I don't know.

Q You mean 2 pipes high?

A 2 pipes high.

Q Over the hatch coaming?

A Yes.

Q But they were still below the height of the uprights, were they not?

A Oh, yes, that is right.

Q So that if the hatch coaming was 3 feet high, and you said they were 6 to 10 inches higher than that, it would be about 3 feet, 6 to 10 inches, is that right?

A I couldn't say. I don't know just how high it would

be.

Q How much lowerthan the top of the uprights was the topmost pipe when this accident happened?

A Well, I'd say the upright might have been maybe a foot over the--above the pipe.

Q A foot higher than the topmost pipe?

A That is right.

Q Where were you standing when this accident happened?

A On the top of the hatch.

Q Yes, but where?

A The No. 1 Hatch.

Q Where on the No. 1 Hatch?

A I was, I'd say, about in the middle of the hatch on top of the hatch covers, because the hatch was closed.

Q And you were in the middle of the hatch, and Mr. Conceicao was up at the forward end of the hatch, is that it?

A Yes, but the No. 1 Hatch is not a long hatch.

Q What was the distance between you and Mr. Conceicao at the time this accident happened?

A I don't know. I'd say about 3 to 4 feet, something like that.

Q Were you facing in his direction when it happened?

A That is right.

Q Did you see the whole thing?

A Yes, I did.

MR. TESTA: Thank you.

THE COURT: Thank you, Mr. Testa.

Mr. Duffy?

REDIRECT EXAMINATION

BY MR. DUFFY:

Q Mr. Ratliff, you saw this last draft when it was landed?

A Yes, I did.

Q Can you describe how it came down on the other pipes? How did the winchman land it?

A Well, they come down with the pipe on two falls, as we say. And he land the pipe down into the well, into the uprights, you know, into the bed.

Q Can you describe for us how the descending or down-coming pipes made contact with the pipes that were stowed on deck?

A Well, when they come down, they--when the winchman come down with the pipe and the pipe is in the proper place where we want to land it, well, he slacks off and the pipe is landed.

Q Was there sharp contact or light contact, or how did these down-coming pipes come in contact?

A I'd say it was light, because we never landed a draft

of that weight fast and heavy. We land it as light as possible.

Q Did you observe any difficulties with the winchman performing his duties that morning while you were at the hatch?

A I did not.

MR. TESTA: I object to this, your Honor, as being improper redirect.

THE COURT: He already answered the question. He said he did not. We will proceed. I'm sure that Mr. Duffy will not pursue any matter that was not within the scope of the cross.

Mr. Duffy, do you have anything else?

MR. DUFFY: That is all, your Honor.

Mr. Wrenn.

RECROSS EXAMINATION

BY MR. WRENN:

Q Yesterday, you told us that as the load came down and the pipe touched the other pipe, at that point the pipe started to roll, is that right?

A When the draft was landed.

Q Landing, i-n-g, is that right?

A MR. TESTA: I beg your pardon, e-d, landed.

THE COURT: Let's find out.

Q Did you say "landed" or "landing"?

A Landed.

Q E-d?

A Yes. I know just what you mean.

Q I can't hear your last part.

A I said "landed".

Q Does that mean as it hit the pipe, the other pipe started to roll?

A When the draft hit the pipe, when the draft is landed, the draft is in the position where the pipe is supposed to stay. And the winchman slacks off and that is when the accident happened. That is when the pipe started to roll out. That is the way I saw it.

Q From the time the pipes touch the other pipes, how long did it take for the pipes to roll?

A I don't remember how long it took.

A Was it fast?

A I would say it's fast, pretty fast, yes.

Q Did it happen at the same time that the pipes first hit?

A I'd say maybe a second in between the time of the landing and the time that the pipes started to roll, could be a second or something.

Q If those pipes did come down and banged into the pile, that could cause them to roll, is that right?

MR. TESTA: Objection, your Honor. There is no such testimony in this case.

THE COURT: I will sustain the objection as to form. If you establish your first point, I will let you ask the rest of the question. But I think you should establish it. I haven't heard it yet.

Q I want you to assume for the moment that when the load came down, it came down hard on the pipes that were there. Based upon your experience, couldn't that cause the pipes to roll?

MR. DUFFY: I have an objection.

MR. TESTA: Objection, if your Honor please.

THE COURT: Sustained.

Q You told us before that the pipes were piled about a foot under the uprights, is that right? In other words, the upright was about a foot over the pipe, is that correct?

A That is what I figure, about a foot over the pipe that we had in the bed.

Q And that is good practice, isn't it, to pile it that high?

A Yes, I guess it is.

Q And if you were to pile the pipes higher than the uprights, that would be bad practice, isn't that right?

MR. TESTA: Objection, if your Honor please. This

man is not an expert. He is asking for expert testimony. This is improper recross examination.

THE COURT: It really gets a little beyond the scope of cross, but here is a hatch boss,

How long have you worked on the water front, sir?

THE WITNESS: About 25 years.

THE COURT: How long have you been a hatch boss?

THE WITNESS: 8 years.

THE COURT: What are the duties of a hatch boss?

THE WITNESS: Well, he is in charge of a hatch, your Honor.

THE COURT: That is to supervise loading and unloading?

THE WITNESS: Yes.

THE COURT: The extent of his expertise is up to the jury. I will permit the question to be asked as to opinion, and you can give Mr. Ratliff's opinion at this point whatever weight you choose to give it or not. You may inquire on the subject, Mr. Wrenn.

Q If the pipes were placed higher than the uprights, that would be bad practice, is that right?

MR. DUFFY: If your Honor please, I have a further objection that there is no proof in the case that it was placed higher.

THE COURT: I'm sure the jury is aware of that. The proof in this case is, according to the witness's testimony, that the highest the pipes were piled is some one foot below the top of the upright, is that right?

THE WITNESS: Yes, your Honor.

THE COURT: I will permit this to be asked. I'm sure the jury recognizes this as a theoretical question. You may answer the question if you have it in mind. If you don't, I will have it read back.

THE WITNESS: Would you have it read back?

THE COURT: Certainly.

(Question read.)

A That is right.

MR. WRENN: Thank you.

RECROSS EXAMINATION

BY MR. CICHANOWICZ:

Q Mr. Ratliff, we have been talking about the coping of the hatch. You describe it as a steel wall, is that right?

A That is right.

Q Is that the steel wall that goes around the opening in the deck so you can go down below?

A That is right. That is the steel wall that goes around the complete hatch.

Q It's like a rectangle, isn't it, that goes around the

opening so if you were walking along, you wouldn't walk into the hatch, you'd walk into the wall, is that right?

A Into the wall, that is right.

Q And on top of that hatch is where your hatch covers are laid, is that right?

A That is true.

Q That is the way you close the opening into the inside of the ship, is that right?

A That is right.

Q When you say you were standing on the hatch covers, those were the covers that were laid on top of this coping, is that right?

A That is right.

Q That was, you say, about 3 feet higher than the deck of the ship?

A Yes.

Q This is the way other hatches were also, is that true?

A That is right. That is the way all the hatches are made.

MR. CICHANOWICZ: Thank you.

THE COURT: Thank you, Mr. Cichanowicz.

RECROSS EXAMINATION

BY MR. TESTA:

Q Mr. Ratliff, yesterday you said on your direct examination that the people who build the pipe beds are supposed to build them strong enough to hold the pipes, is that right?

A That is right.

Q It's customary to build these pipe beds right up to the top of the bed, is that right?

A That is right.

Q That is the whole purpose of the pipe bed?

A Yes.

Q So that you can carry pipe. Right up to the top, nothing wrong with that?

A Well, I don't think it's anything wrong with it.

Q I believe you said that the custom and practice on the waterfront was for the people who build the pipe beds are supposed to make them substantial?

A That is true.

Q They are not built to carry a half a load of pipes, are they?

A No, sir.

Q They are built to carry a complete load of pipes, isn't that right?

A That is my estimation that that is what they are built for.

Q If you fill this right up to the top, even if you put them a little bit over the top, that would be good practice, wouldn't it?

A No, because the pipe would roll then.

Q After it's lashed?

A If you go over the top--when we are loading, we never go over the top of the upright because the pipe would roll out of the bed.

Q Aren't they lashed after you put them in the pipe bed?

A They are not lashed when we are putting them in the bed.

Q But after you put them in, aren't they lashed by the carpenters?

A They lash them after we finish our job.

Q Right. And they put lashings over the top, don't they?

A But the pipe is not over the upright because if it was, they wouldn't have a chance to lash it because it would roll out.

Q So you fill them right up to the top of the upright and then you stop, is that it?

A We go up sometimes to the top of the upright if we have that much pipe.

Q At the time this accident happened, the pipes were one foot below the uprights, is that right?

A That is what I figure. I don't have no specific measurement.

Q That is what you saw at the time, they were one foot below--

A That is what I figured.

THE COURT: Do you have the question?

Q I say that is what you saw at the time the accident happened, that the pipes were one foot below the top of the uprights?

A That is what I figure, it was about one foot below.

MR. TESTA: Thank you.

THE COURT: Thank you very much, Mr. Ratliff. You are excused, and you may leave.

(Witness excused.

THE COURT: Ladies and gentlemen, I think we have come to a convenient point in the proceedings to take our mid-morning recess. I will again instruct you that the case is in progress, you should not discuss it among yourselves within the jury room, and you should continue to keep an open mind on the case. I will excuse the jury for 10 minutes. We will resume at a quarter of 12, which is 10 minutes from now and proceed to approximately 1 P.M.

(The jury left the courtroom.)

(Recess.)

(In the courtroom, in the present of the jury.)

THE COURT: We will now proceed, and we will go through to our luncheon recess.

Mr. Duffy, your next witness.

MR. DUFFY: Mr. Head, please.

J A M E S H E A D, called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUFFY:

Q Mr. Head, where do you live, sir?

A 940 St. Nicholas Avenue.

Q You are employed as a longshoreman?

A Yes.

Q On November 5, 1970, were you working for ITO as a longshoreman?

A Yes.

Q Where was that, sir?

A Pier 36, East River.

Q Was that on the MOSQUEIRO?

A Yes.

Q Were you working with Mr. Conceicao at the time he had his accident?

A Yes, I was.

Q Where were you, sir, when the accident took place?

A Standing on the deck of the hatch.

Q What did you observe happen in the accident?

A We landed a draft of pipe, and it come back. We went to take it, the hooks out of the end of the pipe, the timber broke, the upright broke and the pipes rolled and caught his leg, foot.

Q Caught Mr. Conceicao's leg?

A Yes, foot. Foot and leg.

Q What did you do?

A I tried to hold him, to keep him as calm as possible until we get the pipe off of him.

Q Did there come a time then that he got out of the pipes?

A Yes.

Q How did you get him out of the pipes?

A By rehooking it and raising the end up off his leg.

Q When that timber broke, had the draft been landed?

A Yes, it had.

Q Were the lines slack?

A Yes, they were.

MR. DUFFY: You may cross examine.

CROSS EXAMINATION BY MR. WRENN:

Q Mr. Head, what time did you get to work that day?

A I started 8 o'clock.

Q Did you start to work at 8 o'clock?

A Yes.

Q What was your job that day? What were you doing?

A I am a holdman.

Q What were you doing that particular day?

A Working on pipes on deck.

Q Did you have any particular function in loading those pipes?

A As a holdman, when the draft come over, we put it in the right position to land, and when we get it right, we tell him to come back, he come back, and after when he come back, we unhook it.

Q Which end of the pipe were you working at?

A I was working on the forward end.

Q Where was the plaintiff working?

A He was working on the forward end.

Q Were you working together or were you taking turns?

A Together, yes.

Q Where was the hatch boss that day?

A He was on deck.

Q At the time of the accident, did you say you were standing on the hatch cover?

A Yes, on the deck of the hatch, yes.

Q The hatch cover?

A Yes.

Q How long had you been standing on the hatch cover before the accident?

A We had been working up there approximately all morning.

Q About what time did this accident take place?

A That I don't know exactly.

Q What was the weather like?

A I don't know exactly how the weather was, either.

Q Had you worked on that ship the day before?

A Right.

Q Where had you worked the day before, do you remember? Had you worked in Hatch No. 1?

A In Hatch No. 1, right.

Q Working in Hatch No. 1 the day before, were you using the winches to put cargo into Hatch No. 1?

A Yes.

Q Before you started to work on the deck, the hatch had to be covered?

A Covered.

Q When was the hatch closed? Was it closed the night before or the morning of the accident, do you remember?

A We close it overnight, at night.

Q When you got to work on November 5, Hatch No. 1 was not opened again, was it?

A No.

Q Would you recall offhand what you had loaded in Hatch No. 1 the day before?

A No, I don't remember.

Q Do you remember if you had worked for more than one day in Hatch No. 1?

A Yes, we did.

Q Had you been there for a few days?

A Yes.

Q When you got to work on November 5th, did you see the bed that the carpenters had made, or the crib, or whatever you want to call it?

A Yes, that is right.

Q What do you call the wooden structure?

A I call it a pen, more or less a pen.

Q Did you see the carpenters making that?

A No, I wouldn't say definitely I saw them making it.

Q When you got there that morning, was it completed as far as you know, or had any work been done on it while you were there that morning?

A They had worked on it. Previously, I was passing and

they was working on it.

Q On the date of the accident, did you see them working on it?

A They was around, yes.

Q What did they do to the pen or the crib on the day of the accident, can you tell us?

A To my recollection, they had it finished when we got there that morning and started working on it. It was supposed to be completed when we started loading the hatch, loading the steel into the pen.

Q Was it complete when you started to load?

A As far as I know, it was.

Q Did you take a look at the pen or the cradle before you started to work?

A Well, saying like a look at it, no. All I was there, to load the pipe.

Q Did the pen consist of some wood on the bottom?

A Yes.

Q And there was some uprights, is that right?

A Uprights, yes.

Q But both ends are opened up, is that it? It was like a U-shaped affair so you could put the pipes in?

A Right.

Q Could you tell us about how high the uprights were,

do you remember?

A It was over my head.

Q The upright was over your head?

A Yes.

Q How tall are you, sir?

A I am about 5'11-3/4.

Q Was it over your head when you were standing on the hatch?

A On the hatch, no.

Q It was over your head when you were standing on the deck?

A The deck, right.

Q So if you are approximately 6 foot, how high over your head would you say the uprights were?

A I wouldn't know exactly.

Q Could you show us in any way with your hands or anything of that sort?

A Standing on the deck, I'd say it was at least 4 foot over my head.

Q So that would make the uprights about close to 10 foot?

A Yes, something like that, yes.

Q That morning, you spent, from the time you started to work until the time of the accident, your gang was engaged

in putting the pipes in this upright, is that right?

A Yes.

Q Into the pen or cradle--can we call it a cradle?

A Yes.

Q That is the word we have been using before.

Then, there came a time when the plaintiff had an accident, is that right?

A Yes.

Q Were you actually present when it happened?

A Yes.

Q At the time of the accident, were you actually looking at the plaintiff? Did you see him or did you hear a noise and then turn around, is what I am getting at.

A We were side by side. He was unhooking the pipe. When the pipe give, I jumped back, and he got caught.

Q Where was the pipe coming from? Was it coming from a ship or was it coming from the dock?

A It was coming offshore, off a lighter.

Q At the time of the accident, about how high would you say the pipes were? In other words, could you tell us in feet or layers or whatever.

A From what I was standing, I would say it was--come about here on me (indicating.)

THE COURT: Indicating a point about 3 feet from the

floor, in the mid-point of the leg between the trunk and the knee.

Q That is when you were standing on the top of the hatch, right?

A Yes.

Q Could you tell me how high the top of the hatch was from the deck?

A It would come about waist-high. From the floor deck of the ship up to about waist-high.

Q Would that be another 3 or 4 feet, would you say?

A Yes.

Q So that means that the pipes were about 6 or 7 feet, piled 6 or 7 feet from the deck when the accident happened, is that a fact?

A It's possible.

Q You said, I think, that you were standing next to the plaintiff when the accident happened, is that right?

A Right.

Q When you were standing next to the plaintiff, were you facing inshore or were you facing offshore?

A I was facing inshore. I was facing the work, the pipes.

Q The pipes were in front of you and you were facing inshore?

A Right.

Q As you were there, you said you were beside the plaintiff. Was he on your left or your right, immediately before the accident?

A He was on my left.

Q About how far from you on your left was he? Are you talking about inches or feet or yards?

A Well, we wasn't two feet apart.

Q Did you see the pipes come overhead in order to go into the cradle?

A Yes.

Q Did you people move away as the pipes came overhead?

A Yes, we guide them in, steady them, swing them around. We get them in the right position, we ask them to come back, to lower it, they lower it.

Q The last load they put in before the accident happened, do you remember where it went in the load? In other words, was it near the upright, either one, or was it in the center, or where were the pipes put, do you recall?

A More or less on the side where--the hatch side, but not right beside the upright.

Q Closer to the upright?

A Closer to the upright than it was inshore.

Q Can you tell us how far it was from the upright when

it was put in?

A Not really, no.

Q At the time of the accident, could you tell us about how far you were from the cradle?

A Next to it, steadying, holding the pipes so it could come back.

Q You were touching the pipes?

A Yes, I had my hand on them.

Q Before they were landed, is that what you are saying?

A Right.

Q If I understand you, you are standing on the hatch cover and the winch is bringing the pipes down, and then you put your hands on the pipe to steady them as they come down, is that what you are saying?

A Right.

Q Were both of your feet on the hatch cover?

A Right.

Q Was the plaintiff also doing the same thing you were doing, or was he doing something else?

A He was doing the same thing I was doing.

Q So that the two of you had your hands on the pipes putting it into place as the winch brought it down, is that the idea?

A As the winch brought it down, right.

Q Did the accident happen as the pipe was coming down or did it happen at the time it hit the other pipes, or did it happen after it landed?

A It was after it landed that everything would come back. The wires was loose. He go to unhook the pipe. When he go to unhook the pipe, and it start moving.

Q Who was going to unhook the pipe? Were you going to do it or was the plaintiff going to do it?

A The plaintiff was going to do it.

Q Was he still standing next to you when the accident happened?

A Right.

Q Was he standing on the hatch cover when the accident happened?

A He stepped kind of up on the pipe, lean over the pipe to unhook it.

Q Where was his foot when the accident happened? Was it on the hatch cover or was it on the pipe?

A Well, the next thing I know, the pipe was on his foot.

Q What?

A The next time I saw it, the pipe was on his foot. I wasn't watching to see where he was placing his foot.

Q That was the pipe that moved that was on his foot, right?

A Right.

Q And the pipe that moved, was that on the hatch cover?

A It was on the hatch cover, yes.

Q His foot was on the hatch cover, then?

A It was under the pipe.

Q And the pipe come over onto his foot?

A Right.

Q Did you see the pipe as it was coming down? Would you describe how it landed on top of the other pipes? Did it come down very, very gently or--

A Very, very gently.

Q Didn't bang at all, did it?

A No.

Q After this incident, did you stay there?

A Yes, I stayed there.

Q And did the job continue? In other words, the plaintiff left the ship by way of a pallet, is that right?

A Right.

Q Did you see that? In other words, they took him off the ship with a pallet, and I think he went in an ambulance to the hospital, right?

A Yes, I was right there when they put him in the ambulance.

Q Did the job continue? In other words, did you

continue loading the ship at that time?

A Yes, they did.

Q About how long did it take you to finish putting the pipes into that cradle in order to finish off the job? Do you follow me?

A I understand what you mean to say.

Q Could you tell me?

A After then they stopped loading the cradle. They started loading the pipe across the deck of the hatch.

Q So after the plaintiff was injured, did they put any more pipes on top of this--into the cradle?

A Not then.

Q Ever?

A Ever, I can't say that now.

Q What I mean is, on that particular--any time during that day, did they put any more pipes into that cradle?

A They started loading them across the deck.

Q The pipes?

A And bring them up even, yes, across the hatch covers.

Q They started loading what across the hatch covers?

A The pipe.

Q They put the pipes across the hatch covers, is that what you said?

A That is what I said.

Q Who put the pipes across the hatch covers?

A The gang put them across there.

Q Were you working in that gang as you put the pipes across the hatch covers?

A Yes.

Q How long did it take you to put the pipes across the hatch covers?

A That I don't know. I wasn't the time keeper. I was only working.

Q How high did you pile the pipes on top of the hatch covers?

A It made them level with the other ones.

Q It began about 3 or 4 feet from the deck, is that right?

(No response.)

Q How high altogether would you say the pipes you put on the hatch covers went?

A About 3 high.

Q How were they secured?

A Like the other ones.

Q Did you ever sign a statement for anybody with regard to this incident?

A Sign a statement?

Q Yes.

* * * *

down on the docks?

A 20 years.

Q In 20 years, I presume you have seen a lot of accidents?

A Quite a few.

Q Did you look at anything to refresh your recollection about this particular accident?

A No.

Q In other words, you are testifying just from your memory, is that right?

A Right.

MR. WRENN: Thank you, sir.

THE COURT: Mr. Cichanowicz.

MR. CICHANOWICZ: I have no questions.

THE COURT: Mr. Testa.

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. Head, you said you were 5'11" tall?

A Right.

Q And that the uprights were 4 feet over your head?

A I'd say when standing on deck, yes. Not on the top of the hatch.

Q No, when you were standing on deck, the uprights were 4 feet over your head?

A Approximately.

Q These uprights were 10 feet high, then?

A Approximately.

Q Then, when you said that at the time of the accident the pipes came up to a point on your legs which was 3 feet over the hatch--

A I'd say about, yes, right.

Q Yes. And the hatch coping is about 3 feet high, so that the pipes would still be 3 feet lower than the top of the uprights, is that right?

A I don't follow you.

Q If the uprights are 10 feet high--

A Right.

Q --and the pipes were 3 feet off the top of the hatch coping, they'd still be considerably lower than the top of the uprights, wouldn't they?

A The pipes was not over the top of the uprights, no.

Q That is what I said.

A No.

Q At the time this accident happened, the top row of pipes was lower than the top of the uprights?

A Right.

Q And this last pipe that came into place, that one was securely landed before anything happened?

A Right.

Q You said it was closer to the upright near the hatch coping but not up against the upright?

A No, it was not up against the upright.

Q So it was between two pipes then?

A Right.

Q Do you recall after this last pipe came down, after this accident happened, whether the longshoremen kept working there or not? Do you have any recollection of that at all?

A After he was taken away, we continued working, yes.

Q Did you keep putting pipes in that pipe bed?

A No, they didn't put any more in the pipe bed--in the place where we were working, that pen. They started securing them across the deck.

Q Across the hatch?

A Across the hatch, yes.

Q All the way across the hatch, was that?

A Yes.

Q You mean from one side of the ship to the other?

A From one side of the hatch cover to the other side. Just start throwing them off backward and forwards.

Q Were they loading the pipes from the inshore side to the offshore side, across the hatch cover, is that what you mean?

A Yes. They load them, yes, across the hatch covers.

Q Were there any other pipe beds on that ship, or cribs, or cradles, or pens, or whatever we call them?

A I don't remember what was on the other part of the ship. But we had them on the--in No. 1 Hatch, on both side of the ship.

Q You had this pipe bed on both sides of the No. 1 Hatch, is that what you are saying?

A Yes.

Q Were both of these pipe beds filled with pipe?

A Yes, as far as I can remember, yes, it was.

Q After they put the pipes in the pipe bed, then they put them on top of the hatch, is that it?

A Yes.

Q They'd have pipe all over the top of that ship, then, on the main deck?

A Yes, on the top, yes.

Q In the vicinity of the No. 1 Hatch?

A All across No. 1 Hatch. Further than that.

MR. TESTA: Thank you.

THE COURT: Mr. Duffy?

MR. DUFFY: I have nothing further, your Honor.

THE COURT: Mr. Wrenn?

MR. WRENN: No, nothing.

MR. CICHANOWICZ: Nothing, your Honor.

THE COURT: Thank you very much, Mr. Head. You are excused. You may leave.

(Witness excused.)

THE COURT: Mr. Duffy.

MR. DUFFY: Mr. Brooks, please.

W I L L I A M A L B E R T B R O O K S, called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUFFY:

Q Mr. Brooks, where do you live, sir?

A I live 720 Lenox Avenue.

Q What is your job?

A I am a longshoreman.

Q How long have you been a longshoreman, sir?

A 31 years.

Q On November 5th, 1970, were you working as a longshoreman for ITO?

A Yes, I was.

Q Were you working with the plaintiff here, Mr. Conceicao, at that time?

A Yes.

Q Where were you working?

A We was working on the deck of the ship, loading pipe.

Q What pier was that at, sir?

A That is at Pier 36, East River.

Q Was that ship the MOSQUEIRO?

A Yes, it was.

Q Mr. Conceicao had an accident that morning, is that correct?

A That is right.

Q Where were you standing when you first knew there was an accident to Mr. Conceicao? Where were you at?

A Mr. Conceicao and I was loading the pipes. In other words, we was guiding them into--

Q Where were you standing actually when the accident happened?

A I was standing on top of the hatch.

Q Did you see what happened to Mr. Conceicao?

A Yes, I did.

Q Can you tell us, sir, what happened?

A Well, as we landed the pipes, it became, you know, landed into this container that they had built, Mr. Conceicao was reached over to unhook the pipes. After he had taken one of them loose and stood up on the other pipe to get the other one, then it collapsed.

Q What collapsed?

A The uprights that was containing the pipes.

Q What happened when the uprights collapsed?

A Well, it pinned his leg under the pipes.

Q What happened after that?

A Well, after that, we had to send back for the hooks to lift the pipes off his leg.

Q You say the uprights collapsed; these were the part of that, what you call the container?

A Well, I said that is what contained the pipes in this position.

Q Is that known as a pipe bed?

A Well, I guess that is what they call them.

Q That was made of wood?

A Made of wood.

Q Can you tell us what portion of the pipe bed broke?

A Well, the pipe bed is made as such, we have so much space in such a manner. And as they put the pipes in there, as the pipes rested, he stepped on the pipe to unhook it. By being kind of in the center like, he had to reach over the pipe to unhook. So this bed that was made on this side of the pipe, not on the other side, it just broke down here and the pipes just collapsed this way.

MR. DUFFY: You may cross examine.

THE COURT: Mr. Wrenn.

CROSS EXAMINATION

BY MR. WRENN:

Q Did you ever talk to anybody about what you were going to say before you came here to testify today?

A No, I didn't.

Q Did you ever talk to anybody about what you were going to say?

A No, sir.

Q You were just served with a subpoena, or were you?

A Yes, I was.

Q When were you served with a subpoena?

A Well, I don't know the exact date.

Q Within a few weeks ago?

A Yes.

Q From the date of the accident up until today, you never discussed this case with anyone, is that what you are saying?

A No.

Q And you never signed a statement for anybody?

A No, I haven't.

Q This gentleman is Mr. Duffy. You never spoke to Mr. Duffy about the case, did you?

A No, I didn't speak to him about the case. He served a subpoena, I think, or someone served a subpoena, and that

is all.

Q But you never spoke to him about the case at all?

A No, he didn't ask me about the case.

Q How long were you working on that particular day before the accident happened?

A We started to work at 8 o'clock in the morning. We had worked long enough to fill this particular space that we were working in, with these pipes.

Q How long did that take, about?

A I guess, I imagine it probably took about 2 and a half to 3 hours, but I couldn't be specific about it.

Q Was the cradle filled up at the time of the accident?

A It was filled up over the hatch at that particular time.

Q Was it filled up over the uprights?

A No, it wasn't filled up over the uprights.

Q How high were the uprights?

A I can't be specific, but they never fill the pipes as high as the uprights. They never fill the pipes up much as high as the uprights. The uprights are not built just how high they are going. The uprights are built like this--

THE COURT: Indicating vertically.

A That is right. And they fill it up as much as they want to fill it up, and then they stop. Because that doesn't

indicate the height of the pipes by the height of the uprights.

Q Who decides how high to fill them?

A Well, I don't know. I guess the stevedore tells him how far to put it, but I don't know about that. We just load them as long as they tell us to load them, and then we stop.

Q As long as who tells you to do it, your hatch boss?

A Our hatch boss tells us.

Q And when he tells you to stop, you stop?

A That is right.

Q But those pipes are not piled higher than the uprights?

A No, never.

Q In fact, as a rule, they are supposed to be a little lower than the upright, is that right?

A That is right.

Q But, then, you have room to lash it and put a catwalk across it, is that right?

A That's right.

Q Where were the pipes coming from? Were they coming from a ship or the pier, do you remember?

A They was coming from a barge, a lighter offshore.

Q They were being taken from the lighter by a winch and put into the cradle, is that right?

A Yes.

Q Were you working with the plaintiff for the entire period of time?

A Yes, I was.

Q Did you put every load of pipe into the cradle? In other words, were you there when every load of pipe was being put into the cradle?

A Yes, we were.

Q You, I am talking about. Did you personally participate in putting each piece of pipe in the cradle?

A That is right.

Q Did the plaintiff personally also participate in putting each piece of pipe into the cradle?

A That is right.

Q So every load of pipe that came in, the two of you put into the cradle?

A That is right.

Q Were you there when the first load of pipes was put in?

A Yes, we were.

Q When you got there that morning, there were no pipes in the cradle, is that right?

A As far as I can remember, there was no pipes in the cradle.

Q Had you worked that ship the day before, do you recall?

A Yes, we did work the ship the day before.

Q Do you remember if you worked in Hatch No. 1?

A That I can't remember.

Q Do you remember seeing--

A But I remember we worked there the day before.

Q Do you remember seeing the cradle there the day before?

A Yes, I think it was there.

(Pause.)

THE COURT: You think the cradle was there the day before?

THE WITNESS: Yes, I think it was there the day before. I'm not specific about it, because I know some cradles was there in another hatch, but I'm not so sure of this particular one, you know.

Q So there were 1 or 2 cradles, and at least one was there the day before, but whether or not this particular cradle was there the day before, you are not sure, is that what you are saying?

A I'm not sure of that.

Q At any rate, when you got there at 8 o'clock on the date of the accident, the cradle was finished, is that correct?

A That is right.

Q Did you take a look at the cradle before you started

to put any pipes in it? Did you look around to check it or do anything to it?

A No, I didn't.

Q Did you look at it at all?

A We looked at it.

Q Did you look to see if everything was in place?

A Sure.

Q Because you knew you were going to load tons and tons of steel pipe into that wooden cradle, is that right?

A I didn't look at it for that reason.

Q Why did you look at it?

A The cradle is built a certain way that the pipes fit in there. Those pipes fit in there, they don't use any wood between them. And the wood have to be straight so one end gives and the other end doesn't give. Each end is supposed to be the same, the same distance apart, the same measurement. That is the only way we looked, to see that these pipe will fit exactly after you finish each tier, to be the same.

Q If I understand, you looked it--

A The cradle is built to contain the pipes. Each end is supposed to be the same width across, exactly, so that the pipes don't give one other the other.

Q Once you put in a certain number of pipes, they are supposed to fit in snug, is that right?

A Then you know they are the same. That is the only reason we look at that.

Q Did you check that day to see if they would fit in there?

A That is right.

Q Did you check the bed at all to see that it was secure? Did you look around the bed to see if there was any cracked or broken wood or timber?

A No, we don't do that.

Q Did you put your hand on the butt of the wood that was sticking up to see that it was secure?

A No, we don't do that.

Q Did the hatch boss do that?

A I imagine he did. I don't know whether he did or not.

Q Isn't it the usual practice before you work that the hatch boss goes and checks out the area to see if everything is all right for his men?

MR. TESTA: I object to that man testifying as to what the usual practice of the hatch boss was. The hatch boss was here and testified in person.

THE COURT: You say you worked on the waterfront 20 years, I believe?

THE WITNESS: 31 years.

THE COURT: 31 years on the waterfront.

Have you had occasion to work with cradles before?

THE WITNESS: Yes.

THE COURT: Are you familiar with the way the cradles are put together?

THE WITNESS: Well, I guess I have seen them there a lot and I have seen how they are made, you know, how people put them up.

THE COURT: Are you familiar with what the stevedores do to check the cradles, if they do anything?

THE WITNESS: Well, they go around and look at the work.

THE COURT: Just as you have described so far?

THE WITNESS: Just as I have described so far.

THE COURT: Do they do anything else?

THE WITNESS: No, they don't do anything else.

Q Before the gang begins work, isn't it the job of the hatch boss to go and check the area where his men are going to work?

MR. DUFFY: I object, your Honor.

MR. TESTA: I object, your Honor.

THE COURT: Sustained.

Q Isn't it the custom and practice for the hatch boss to do that?

MR. TESTA: Objection, your Honor.

THE COURT: Sustained.

Q In the event you or the hatch boss see any defect in the work area, don't you or the hatch boss call it to the attention of the ship?

MR. DUFFY: Same objection.

THE COURT: Sustained as to form. If you want to ask the witness about his practice as a holdman or deckman, I will permit you.

MR. WRENN: Your Honor, he is familiar with the practices of the hatch bosses.

THE COURT: Are you familiar with the practices of the hatch bosses in checking and inspecting cradles?

THE WITNESS: I have never worked as a hatch boss since I have worked there. Always I have been just a worker.

THE COURT: You are a worker, but even though you didn't work as a hatch boss, can you tell us whether or not you are familiar with the practices of the hatch bosses?

THE WITNESS: Well, the hatch boss has the men--

THE COURT: Just answer yes or no. Are you familiar with the practices of the hatch boss?

THE WITNESS: Yes, I am.

THE COURT: Are you familiar with what the hatch bosses do in connection with checking out cradles before you

start filling them?

THE WITNESS: Well, he goes around and look it to see if it is right to load, if it's built right. He don't know whether it built right, but he look at it to see if built to put the things in.

Q Isn't that true of any work area? Any time you fellows are going to work, the hatch boss goes and he looks to see that everything is in order, isn't that his job?

MR. TESTA: Objection, if your Honor please.

THE COURT: Sustained.

Q Is it the hatch boss's function to check the work area before his men go there?

MR. DUFFY: Objection.

MR. TESTA: Objection.

THE COURT: Sustained.

Q What is the function of the hatch boss with regard to inspection of areas before his men go there?

MR. TESTA: Objection.

MR. DUFFY: Objection.

THE COURT: Sustained.

Q In this particular case, who was your hatch boss?

A Mr. Ratliff.

Q Before you began the job--8 o'clock, I think you said you started?

A That is right.

Q Did Mr. Ratliff check the cradle? Did you see him look at the entire area before you fellows began to load?

A Yes, he has to do that.

Q If we could go now to the point where you said you were landing the pipe. How far was the plaintiff standing from you when the pipe was coming down, before it touched the other pipes?

A He was on one end of the pipe, and I was on the other. We was standing on the hatch.

Q Were you on opposite ends of the pipe?

A Right.

Q Oh, I got it. He was near the front of the ship.

A Not the front of the ship.

Q The end of the pipe near the front of the ship.

A We were standing on the hatch, on top of the hatch. The hatch is--I don't know exactly how long the hatch is, but anyway, he is on one end of the pipe and I am on the other. And we just kind of keeping steady to be landed.

Q How far from you was he?

A I guess about as far as from here to you.

Q In other words, the length of the pipe?

A Right.

Q If the pipe was about 30 feet long, then he'd be

about 30 feet away from you, is that right?

A No, not necessarily. We don't stand on the end of the pipes all the time. We stand in a way that it could be balanced to be landed.

Q A couple of feet from the end?

A If you say that.

Q Whatever you say. How many feet would you be from the end of the pipe? Would you be from 2 to 4 feet from the end of the pipe?

A At times, you'd be that far, and sometime you'd be at the end of it.

Q At the time of the accident, the plaintiff was about the distance from you that I am?

A Right.

Q What were you doing immediately before the accident? Did you have your hands on the pipe or were you waiting for the pipe to become landed?

A Before the accident?

Q Yes.

A Before the accident, we had taken the hooks off the pipe.

Q You say "we". Were you just talking about you?

A I had taken the hooks off the side that I was on.

THE COURT: There were two hooks on your side, there

were 2 hooks and 2 pipes?

THE WITNESS: Right.

Q How many men were down at your end working with you? Were you doing that by yourself, or was there another fellow with you?

A Sometime it would be 2 men, sometime it would be 4 men. It all depend on the job. A lot of time, we can't use but 2 men, sometime.

Q I am talking about this particular job with this particular pipe, if you will, how many fellows worked with you at your end? Was it just you, was it one other fellow?

A There was other people working there, too. I'm not sure, but I think it was someone else working there, too.

Q So, now, you took your hook out, is that right?

A Right.

Q When you took your hook out, did you do it by standing on a hatch?

A That is right.

Q Just leaned over and unhooked it?

A That is right.

Q After you finished that, what did you do?

A I couldn't lean over like that on the pipe because this particular draft of pipes was farther in the bed of the-- you know, this container.

Q Right.

A The pipes was like this, and it was about as wide as this side of the hatch, and by being so far out, we had to climb up on the pipe like and take them off.

Q You couldn't touch the pipe as it was coming down?

A We have to touch the pipe coming down to get them straight end out so they will go into this container straight.

Q You were touching the pipe as it was coming down?

A You put your hand over like this, and help the pipe to come down like that.

Q How many people were touching it as it was coming down?

A As far as I know, I was the only one on that end, as far as I can remember.

Q Did you see how many fellows were touching it on the other end?

A Well, I don't know, but I don't remember one person touching it.

Q And that was the plaintiff?

A That is right.

Q Did the accident happen before you unhooked your pipe or after you unhooked your end of it?

A After it was unhooked.

Q Did you and the plaintiff unhook the pipe at the same

time?

A Well, it just about the same time it's supposed to have been. You can't say--after the pipe landed, we were supposed to unhook it. Sometime I might hook one end faster than they could unhook their. You don't just time it that way. But the weight have to be off the pipe down in there to unhook it. Like I unhooked this end. This end was already unhooked.

Q Then did the accident happen?

A He was unhooking his. He unhook the one closer to him, like. He climbs on the pipe, reaches over to the other one.

Q He was climbing on the pipe when the accident happened?

A He was on the pipe already.

Q Did you see him go up on the pipe?

A I have to see him because we are working together and we have to see what each other does.

Q Are you still on the pipe when he was climbing on the pipe to unhook it?

A When he was climbing on the pipe to unhook it, I was finished.

Q Were you still on the pipe?

A No, I wasn't on the pipe then.

Q So at the time of the accident, you were standing there?

A I was standing just on the hatch cover, on the hatch, waiting for him.

Q How high up the pipes did he climb in order to unhook that hook?

A Well, the pipe is like this. (Indicating.)

Q How high off the deck, would you estimate?

A On the deck, I guess there was about 4 or 5 pipes. After the deck service like this--I mean like this.

Q In other words, the pipes were piled higher than you?

A No, they wasn't higher than I am.

THE COURT: You were on the hatch cover?

A We was on the hatch cover.

Q No, but if you were standing on the deck, the pipes would be higher than you, would they?

A I was on the deck.

THE COURT: He is trying to ask you this question: How high from the deck itself to the top of the pipes?

A Oh, I guess about maybe 3 or 4 feet.

Q Did you see the plaintiff step onto the pipe?

A Yes, I did.

Q Did the pipes move at all at any time before he

stepped onto the pipe?

A No, they didn't.

Q They first started to move after he stepped onto the pipe?

A They didn't move when he stepped onto the pipe.

Q Did they move at any time?

A They didn't move at all. The pipes can't move after they are in this container. The pipes can't roll over or do anything.

Q Did you see any of the pipes roll?

A Did I see the pipes do what?

Q Did you see any of the pipes roll?

A The pipes moved when this upright broke. That is the only time the pipes moved.

Q How many pipes moved?

A All the pipes moved that was on that side of the upright because the upright keeps the pipes in place. So, if this side moves, all of them are going to cave in like this.

Q Did all the pipes cave in?

A One end was secure.

THE COURT: That is the end where you were?

THE WITNESS: That is right. It doesn't move at all. This upright on this side here, you know, like it broke.

THE COURT: Is that the side where the plaintiff

was?

THE WITNESS: That is right. And it broke, so naturally, this side, the pipes are here on the offshore like they was on this side, so the pipes is just about level. So when this break, the pipe falls over.

Q How far do they fall?

A They fell all the way to the--

Q To the deck?

A That is right. To the cover, not the deck. They was already on the deck all the time.

Q So one end of the pipes rolled onto the hatch cover, is that what you are saying?

A That is right. Over to the hatch.

Q How far did they roll? Are we talking about a few inches or feet, or what?

A This applies for the pipes. You can't walk between them. When they put up the pipes, there is no way to walk between that and the cover or the side of the ship. This is just made so they can hold the pipes in the container. So they takes up all the space they can. It's no space between them unless it's where the ship curves or something like that, and that would be offshore on the railing of the ship.

Q How many uprights came down?

A So, when the upright cracked and broke, the only

thing everyone was interested in is trying to get the pipes off of the plaintiff. We couldn't tell how many uprights broke, but I knew this one broke and pinned him under there.

Q Pinned what?

A Pinned his foot under the pipes or between the pipes.

THE COURT: Are you saying that at least one upright broke, but you don't know how many more?

THE WITNESS: That is right.

Q At the time the plaintiff's foot was pinned, where was the foot? Was it on top of the hatch cover?

A His foot was between the pipes.

Q And it stayed between the pipes all the time?

A You couldn't move from under there. When the pipes rolled on his foot, you couldn't remove it.

Q They got the winch and removed the pipe?

A That is correct.

Q Then did you continue working?

A I guess we went out to get the basket and to get him at the front. After we got him to the front, I don't know what happened because this consumed a lot of work, and so we worked that afternoon.

Q The first, then, you went back to work was in the afternoon?

A I myself.

Q That is what I mean.

A Right.

Q The rest of the time you were helping the plaintiff, is that correct?

A That is right.

Q When you got back to work in the afternoon, did you continue to load? Of the pipes?

A Yes.

Q Did you load any other pipes in that cradle where the plaintiff had his accident?

A No, prior to the accident, we started loading across the hatch.

Q When you got back that afternoon, was there a catwalk across those pipes?

A That I don't remember if there was. Whether the catwalk was made then or not.

MR. WRENN: Thank you, sir.

THE COURT: Thank you.

Mr. Cichanowicz.

MR. CICHANOWICZ: No questions.

THE COURT: Mr. Testa.

MR. TESTA: No questions.

MR. DUFFY: I have no additional questions.

THE COURT: Thank you. You are excused, sir. You

* * * *

AFTERNOON SESSION

2:00 P.M.

(In the courtroom, in the presence of the jury.)

THE COURT: Good afternoon, ladies and gentlemen.

We are now going to resume, and I will call on Mr. Duffy again to proceed with the plaintiff's case.

MR. DUFFY: If your Honor please, at this time, on behalf of the plaintiff, I would read excerpts from the deposition of the defendant, New Jersey Export Marine Carpenters, Inc. by William Montella, taken January 9, 1972.

THE COURT: All right. You will give counsel page and line when you read. I have a copy of the deposition. Do each counsel have one?

MR. TESTA: Yes, your Honor.

THE COURT: Very good. You may proceed, Mr. Duffy.

MR. DUFFY: This is from the deposition of the defendant, New Jersey Export, by Mr. William Montella, is the man who is answering questions.

Page 3, line 16.

"Q Mr. Montella, would you tell us your full name?

A William Montella.

Q Where do you reside?

A 3714-D Hylan Boulevard, Staten Island, New York.

Q Mr. Montella, by whom are you employed, sir?

A At the time, I was employed by New Jersey Export Marine Carpenters."

Page 4, line 3.

"Q In November of 1970, what was your job with New Jersey Export Marine Carpenters, Inc.?

A I was head foreman.

Q New Jersey Export does marine carpentry work, that was their line of business in November of 1970?

A Yes.

Q For how long a time prior to November of 1970 had you been head foreman with them?

A About 5 years.

Q How long have you been a marine carpenter?

A 21 years.

Q In November of 1970, where did you work for New Jersey Export? Was there any one particular place or did you work all over?

A Pier 36, East River."

Page 5, line 8.

"Q Did you report to Pier 36 more or less on a regular basis in November of 1970?

A Yes.

Q Did you have a regular gang at that pier at

that time?

A Yes."

Then down to Line 21.

"Q In November of 1970, who did New Jersey Export do the marine carpentry work for at Pier 36? Who did they work for?

A Netumar.

Q In other words, your work orders would come from Netumar?

A Yes.

Q How did you get your work orders as head foreman?

A From the port captain.

Q That is Netumar's port captain?

A Yes.

Q Can you recall, sir, at that time who was Netumar's port captain?

A Dick Piper.

Q Were there other ships coming to Pier 36 at that time beside Netumar ships?

A I believe yes. I believe we also had--I didn't do the work on them because Belgian Line, I think, that used to go there.

Q Did Belgian Line use other carpenters?

A Yes.

Q In other words, your boss at Pier 36 was Netumar?

A Just Netumar.

Q How did Mr. Piper, the port captain of Netumar, transmit the work orders to you or relay them, or were they written orders that he would give you?

A Orally.

Q Once the job was done, what was the first writing in connection with the job?

A The signing of the bills.

Q Who prepared the bills?

A I don't understand what you mean.

Q I am just looking for the procedure as between the ordering and your doing the work and getting paid for it. In other words, you got verbal instructions from Mr. Piper?

A Yes.

Q You went and did the work?

A Yes.

Q What did you do, submit vouchers or time sheets to your office?

A I would get a bill signed for the amount of labor that was on the terminal at that time. I would

get it signed for, and I would turn it into my main office.

Q You would write up the bill yourself?

A I would write in what we did and the amount of men.

Q In other words, this would be a handwritten bill that you would make up?

A We had forms for it.

Q Forms?

A Yes.

Q Mr. Piper would sign that?

A Yes.

Q You would turn that into your office, which is New Jersey Export?

A Yes.

Q They would bill Netumar as a matter of office procedure?

A Correct.

Q At no time did Mr. Piper give you written instructions or specifications as to the work to be done?

A No, sir.

Q Do you have a specific recollection of any carpentry work that you or your men performed on the

MOSQUEIRO in November of 1970?

A Not really. You know, you do a lot of ships, every day a different ship. If I were to say that I remember exactly what I did that particular day, I don't.

Q If your firm did work on the MOSQUEIRO, would that show up in a bill signed by Mr. Piper?

A I imagine so."

Page 8, line 7.

"Q Do you know if you or New Jersey Export did any marine carpentry on the MOSQUEIRO in November of 1970, the early part of November?

A I recall this incident that I am here for today, but if you were to ask me without mentioning that incident if I worked on that ship that day, I couldn't possibly be able to tell you. I'd be lying.

Q When you say"this incident,"you are referring to the accident to Mr. Conceicao, who was an ITO longshoreman?

A Probably. I guess so, because he worked for ITO."

Page 26, line 9.

"Q Do you recall what your orders from Mr. Piper were on that carpentry at the No. 1 Hatch?

A I don't understand your question.

Q What did he tell you he wanted?

A Pipe bed.

Q Did he tell you how much pipe he had?

A They never do.

Q Did he tell you the size or tonnage of the pipe?

A They never do.

Q Was the construction of the pipe bed a repeat job on the Netumar Line operation?

A I have been criticized many times for doing too strong a job.

Q Had you done a pipe bed for Mr. Piper previously?

A Many times.

Q Did you also build it the same size?

A Always the same size timber.

Q How about the size of the pipe bed?

A Depending on the width of the deck."

Page 28, line 2.

"Q This is the bed that is constructed for the carriage of pipe at sea on open deck?

A Correct.

Q In other words, when you build it, you have

to bear in mind that it's going out to sea, and it has to be a secure stowage for the pipe?

A Right.

Q So am I correct, sir, that apart from the actual laying in of the pipe in the bed, the construction of the bed and the lashing down of the pipe in the bed is also your job?

A Correct, other than the loading.

Q Other than the loading?

A Yes.

Q The bringing in of the pipe into the bed is done by the longshoremen?

A Right.

Q But the building of the bed--

A And the securing of the pipe.

Q --and the securing of that pipe, that is your job?

A Right.

Q All Mr. Piper told you was to build two pipe beds?

A Correct."

Page 29, line 9.

"Q You made no inquiry on this occasion of Mr. Piper as to how much pipe was supposed to go into

those two beds?

A Mr. Piper lays out the ship, tells me what he wants. If I told him, Mr. Piper, how much pipe do you have, what is the width, what is the tonnage, he would tell me, "Get the hell out of here."

Q So on this occasion, you did not ask him how much pipe was supposed to go into these beds?

A If he needed more beds, I would have built more beds. He told me, "Build 2 beds at No. 1 port and starboard."

Q You did not ask him how much pipe was going into those beds?

A No, I did not."

And that completes the reading from that deposition, your Honor, on behalf of the plaintiff.

At this time, your Honor, I'd like to continue and read from the deposition of the defendant and third party plaintiff, Cia. de Nav. Mar. Netumar, by Richard A. Piper, which was taken March 22, 1973.

Page 3, line 10:

"Q Will you please state your name for the record?

A Richard A. Piper. 8 Yacht Club Cove, Staten Island, New York.

Q Mr. Piper by whom are you employed?

A Netumar.

Q What is your job with them?

A Port captain.

Q How long have you been employed by Netumar as port captain?

A Almost 3 years.

Q For how long have you been working for Netumar?

A 3 years.

Q Can you tell us, sir, your background and work experience leading up to your coming to Netumar as port captain?

A You mean educational?

Q Yes.

A Maine Maritime Academy, sailed as Third Mate for various American flagships. Sailed for Moore-Mac Lines, stevedore superintendent with Moore-Mac Lines, container operations Moore-Mac, stevedore for Eagle, Inc., Jacksonville, Florida, and my present position with Netumar.

Q Approximately how many years does this maritime experience cover?

A Including school, approximately 14 years.

Q On November 5th, 1970, you were port captain

for Netumar?

A Yes.

Q Where did you perform those duties at that time?

A Pier 36, East River.

Q Can you give us an outline of your duties, please, as port captain?

A Coordinating the stowage of all vessels with traffic and bookings, ordering labor, general supervision of the operation of the vessels all over the east coat.

Q What type of an operation was Netumar running at that time? Was it a liner operation?

A Yes.

Q Liner service?

A Yes.

Q Approximately how many vessels a month did that involve at Pier 36 at that time?

A Approximately 4.

Q These 4 or so vessels a month would have both inbound and outboard cargo?

A Yes.

Q On outbound cargo in that liner operation at that time, who laid out the cargo?

A I did.

Q That was your department?

A Yes.

Q On behalf of the vessel in the loading of the vessel, was it your job to supervise and oversee that loading as far as the vessel was concerned?

A Not exactly. In conjunction with the chief officer and master, proposed stowage was given and then approved and then also with the approval of the stevedore.

Q In other words, the chief officer and the captain would participate in the general loading operation?

A Definitely. I was there only to assist them.

Q In some operations, the deck officers have nothing to do with the loading, but here it was a situation where they worked in conjunction with you, is that correct?

A That's the way our operation is run.

Q As port captain, who did you have working directly for you? Do you have any assistants or anything like that?

A No, I have associates. In other words, people in similar capacities where we would pinch-hit

for each other and also, you know, a clerk and ship runner.

Q In other words, there was more than one port captain for Netumar at that time?

A Yes, definitely, there was more than one. It could have been up to 3. I don't recall exactly at that particular time.

Q Would there generally be one port captain assigned to a ship?

A The intention is to do that, but sometimes operations require that the man assigned wouldn't be available, and this is why I say the other ones would have a general knowledge of what is happening.

Q Would your duties as port captain at that time take you out to the out ports as well?

A In some instances, yes.

Q But generally it had to do with the loading and unloading of cargo at Pier 36?

A No. It had to do with the total operation of both our vessels at any port of call. They ran into the Great Lakes, the whole east coast.

Q Aside from loading and unloading cargo, you would have such things as crew stores and bunkers and repairs. Would they come through you too, generally?

A No. The initial request might come from me, but the actual ordering was done through our general agents at that time.

Q So that essentially your duties did relate to cargo, as port captain?

A Yes.

Q The entire flow of cargo at the out ports and New York?

A Yes.

Q And the coordination of all that?

A Yes.

Q The loading and unloading was within your responsibilities in conjunction with the ship's officers, is that correct?

A Yes."

At this point, your Honor, the cargo plan was marked and I would request that the cargo plan be marked by the Court at this time. I believe it will be Plaintiff's Exhibit 4.

THE COURT: Mark it Plaintiff's Exhibit 4 for identification, show it to the other side. If there is an objection, I will hear it. If there is not, we will receive it.

XXX (Plaintiff's Exhibit 4 marked for identification.)

MR. TESTA: Can we approach the bench, your Honor, on this?

THE COURT: All right. Bear with us a moment, ladies and gentlemen.

(At the Side Bar.)

MR. TESTA: I just thought this ought to be clarified in the record. I am just calling to the attention of the Court the fact that this cargo plan says sailed November 3, 1970 from New York, and the date of the accident is November 5, 1970.

THE COURT: I have been reading ahead of you on the transcript, and apparently there was a clerical mistake in the Netumar office, and they did indicate a November 3rd date, but I think it will be clarified later on. As a matter of fact, if you gentlemen want to stipulate to the sailing date, if you all know it, we will take a stipulation on that.

MR. DUFFY: I will stipulate.

MR. CICHANOWICZ: I will stipulate.

MR. TESTA: I am just pointing this out to the Court. If it's an error, it's an error.

THE COURT: It's an error, yes. Would you stipulate to the sailing date?

MR. CICHANOWICZ: The 5th?

MR. DUFFY: Yes.

MR. CICHANOWICZ: It finished up the same day and sailed on the 5th.

MR. TESTA: Does the record show that anywhere?

THE COURT: Why don't we do this: You will admit this and indicate that the information at the top, "Sailed November 3rd, 1970" is an error, and we'll leave it at that for the moment.

MR. TESTA: I just wanted the record to note that.

(In open court.)

MR. DUFFY: I offer that in evidence, your Honor.

THE COURT: I understand there is no objection except that counsel have pointed out to me that on the top of the exhibit there is written, "Sailed November 3, 1970." All counsel agree that that date, November 3, 1970, is an error. Therefore, I am going to admit the cargo plan without objection, and I suggest to the jury that you disregard the erroneous sailing date which appears at the top of the exhibit.

Is that satisfactory, gentlemen?

MR. CICHANOWICZ: Yes, sir.

XXX (Plaintiff's Exhibit 4 was received in evidence.)

MR. DUFFY: Your Honor, shall I continue there or leave that out, correcting the testimony?

THE COURT: Perhaps you would want to correct it. If we have it down.

MR. DUFFY: "Q Mr. Piper, I show you Plaintiff's Exhibit 1", which is Plaintiff's Exhibit 4, which was marked on this trial, "which has been marked for identification and can you tell us, sir, what this document is?

A Cargo plan.

Q For what vessel and what voyage?

A MOSQUEIRO, Voyage 5 southbound.

Q Now, I note that it says up here, sailed November 3rd from New York, and the accident we are dealing with took place on November 5th. Can you explain that?

A Only to say that it must have been a clerical error by the plan clerk in his date.

Q In other words, the sailing date as listed on Plaintiff's Exhibit 4 in evidence would not be conclusive as to the sailing date?

A As to the sailing date, I don't believe so. I don't recall exactly the date without looking at a calendar. I couldn't tell why. Maybe it was a Friday, the 3rd, and he was completing his plans and didn't finish cargo actually until Saturday or Sunday.

Q Mr. Piper, do you have a specific recollection

lpd "Piper-

of pipe cargo being loaded and carried aboard the MOSQUEIRO on November 5th, 1970?

A Yes.

Q Can you tell us how or why you recall this pipe cargo specifically?

A After looking at the cargo plan, my memory serves me and I recall definitely loading pipe and I believe in this particular time period we were carrying quite a bit of pipe on our vessels.

Q In other words, your recollection of that pipe cargo would be one of a series of routine cargo that you were handling at that time, is that correct?

A Yes.

Q Do you have any other specific recollection concerning the particular type cargo?

A I have recalled the incident of an accident on the vessel at that time.

Q Can you tell us, sir, from your own recollection where that type cargo was stowed and-- "

THE COURT: There is no word "pipe" in my transcript.

MR. DUFFY: I just interpolated the next correction of Mr. Cichanowicz, sir.

THE COURT: All right.

BY MR. DUFFY:

"Q Can you tell us, sir, from your own recollection where that pipe cargo was stowed and how it was stowed, or would you use the cargo plan to refresh your recollection?

A I used the cargo plan to refresh my recollection.

Q Referring to the cargo plan, can you show us on there where the pipe cargo at No. 1 Hatch was carried?

A It's carried in No. 1 as indicated."

Then, I make a reference to the exhibit:

"Let the record indicate that the witness has pointed to the area on the cargo plan on the right side and end of the sheet over No. 1 Hatch where the following letters are recorded, N.Y., for New York, 30, 41 pieces pipe, P N.S.T.B. 57 ton.

Q Now, looking at that cargo plan, sir, can you tell us, and relying on your own recollection, the approximate dimensions and weight of those pieces? Were they all the same?

A From my recollection, yes.

Q What was their approximate size?

A Approximately the size, as I recall, was 40 foot by 18 in diameter.

Q The approximate weight would be somewhere, I guess, in excess of 1 ton, since there were 41 pieces and the overall weight was 57 tons?

A According to the cargo plan, yes.

Q Yes, would that cargo plan be conclusive as to the amount of pipe that was stowed on deck at that time?

A In my opinion, it would definitely be an indication as to the number of pieces. But as far as the weight, I don't know if that would be actually the exact weight.

Q But this would be conclusive as to the number of pieces?

A Yes.

Q Am I correct from the cargo plan it appears that this cargo was stowed port and starboard?

A Yes, sir.

Q From its location on the cargo plan, this pipe cargo was stowed on deck?

A Yes.

Q Do you have a specific recollection of how this particular pipe cargo was stowed on deck at that time?

A Yes, it was stowed in pipe beds.

Q What is a pipe bed?

A Well, it's timbers and lumber constructed so as to permit the safe carriage of this type of deck cargo.

Q Was that pipe bed a permanent part of the vessel or was it constructed?

A It was constructed.

Q Who constructed it?

A The contract carpenter force at the time employed by us was New Jersey Export.

Q Do you have a recollection of when that pipe bed was constructed?

A Not exactly. I believe construction began on the 2nd or 3rd, I'm not positive.

Q Would this pipe bed be left on or would the pipe bed be taken off when the carriage of this cargo was finished?

A It would be dismounted.

Q Who ordered the pipe bed to be constructed?

A I ordered it to be constructed.

Q Who did you order to construct the pipe bed?

A Mr. William Montella.

Q What did you tell him?

A I told him that we had so many pieces of pipe

to be loaded on the vessel for Rio. Because of its size, it must go on deck, and therefore, I wanted a sufficient bedding made to carry this safely.

Q Was this by a written work order or orally?

A No, orally.

Q Who was doing your loading at that time?

A You mean the contract stevedore?

Q Yes.

A ITO.

Q In other words, when this pipe bed was constructed, then it would be ITO's longshoremen that would load the pipe into the bed?

A Yes.

Q Was anything else done with that pipe cargo after it was loaded into the bed?

A It was secured by lashing.

Q Who did that securing?

A New Jersey Export.

Q At that time, was this the first time that you had ordered such a pipe bed from New Jersey Export?

A No, sir, I don't believe so.

Q Can you recall approximately how many times and over what length of time you might have previously ordered such pipe beds?

A I don't recall, but I know it was probably at least half a dozen either prior to this particular bed or afterwards.

Q In each of these instances, did you have dealings, if you recall, with Mr. Montella?

A I believe it was him in all cases.

Q Were the orders essentially the same depending on the size of the cargo or the amount of the cargo?

A The orders were the same every time.

Q In other words, you have so much cargo, build me pipe beds to hold this, is that essentially what it was?

A No. I would tell him I have so many pieces of pipe of so much dimension and length which must go on deck, and he would determine the size of each bed, knowing the characteristics of the vessels and the spots available to put the cargo.

Q A bed was constructed at this time, is that correct?

A Yes.

Q Were there more than one bed constructed?

A I believe there were 3.

Q Do you recall where they were located?

A Referring to the plan, I recall that they were

located port and starboard side of No. 1, and I believe-- well, I can't tell from this, and I don't recall exactly whether it was port or starboard at No. 2.

Q But you do have some recollection that there probably was another one?

A I know there was definitely a third one.

Q There was definitely a third one?

A Yes.

Q When you told Mr. Montella that you had these 41 pieces of pipe that had to be stowed on deck, was there any further discussion?

A I didn't specifically tell him there was 41 pieces of pipe. I gave him the full booking of the vessel and left it up to him as to the number of areas he would require to stow it safely.

Q In other words, the fact that the stowage ended up with 3 beds, that would be Mr. Montella's decision?

A Yes.

Q The location as to which hatches, would that also be his decision?

A I think the characteristics of the ship determine what spaces are available for the stowage of this because of its extra length.

Q But he was the one who made a decision where

how much part would go?

A He made the decision as to how much would fit in various parts and indicated to me that he would require port and starboard in No. 1 and at least one side of No. 2. And then I might, I don't recall exactly, whether I told him make it on the starboard side of No. 2 or the port side.

Q Then he went ahead with his men and he built these pipe beds, is that correct?

A Yes, sir.

Q What documentation did you have as port captain for the billing of these pipe beds?

A The only documentation I believe in the file is the amount of lumber that was ordered by Mr. Montella for this job.

Q Who paid for that lumber, if you recall?

A Netumar.

Q How about the work and the charges for Mr. Montella's gang?

A Netumar paid.

Q Was there any documentation associated with that, as far as you were concerned?

A Only the work sheets and then the final billing.

Q Would you sign the work sheets or something like

that?

A In some cases, although in this one I didn't.

Q Do you have those worksheets?

A Yes.

Q May I see them, please?

A These are also worksheets for the entire time the vessel was in port and loading."

MR. DUFFY: Then, at this time, your Honor, I ask that these 7 copies of daily labor record be marked as Plaintiff's Exhibit 5 in evidence.

THE COURT: Let's mark them first for identification, then show them to counsel and, if there are objections, I will hear it. If not, they will be received.

XXX (Plaintiff's Exhibit 5 marked for identification.)

THE COURT: There are 7 of these, you say?

MR. DUFFY: Yes, sir.

THE COURT: They are called daily labor record sheets?

MR. DUFFY: Daily labor record.

(Pause.)

MR. DUFFY: If your Honor please, subject to their receipt, we have copies of the actual documents, instead of the photostatic copies.

THE COURT: I will hear counsel if there is any

problem.

MR. DUFFY: If your Honor please, in order to conform with the continuity of the transcript of the deposition, I request that the first 6 sheets be marked as Plaintiff's Exhibit 5-A through F for identification, and that the 7th sheet be marked Plaintiff's Exhibit 6 for identification.

XXX (Plaintiff's Exhibit 5-A through F marked for identification.)

XXX (Plaintiff's Exhibit 6 marked for identification.)

THE COURT: Any objection, gentlemen?

MR. CICHANOWICZ: No, sir.

THE COURT: Thank you, Received. That is Plaintiff's Exhibit 5-A through F and the last will be Plaintiff's Exhibit 6, to conform with what you say appears in the transcript. You may proceed, Mr. Duffy.

MR. DUFFY: Page 18, line 7.

"Q Mr. Piper, referring to Plaintiff's Exhibit 6 in evidence, would that be all of the lumber that was ordered and used in the billing of these pipe beds?

A Yes, sir.

Q I see that Plaintiff's Exhibit 6 and Plaintiff's Exhibit 5A through 5F are all signed by James H. Ryan. Can you identify him, sir?

A Yes. He was a clerk on the pier working under me.

Q As an ordinary part of your routine operation at that time, he signed these documents to verify that this work was done and that these materials were supplied?

A No. He signed them to verify that material was delivered and that the number of men and working hours were correct."

MR. DUFFY: That completes my reading from the deposition of the defendant Netumar, your Honor.

THE COURT: Thank you very much.

MR. DUFFY: That, sir, is the plaintiff's case.

THE COURT: At this time, the plaintiff has concluded his case. We will take a short recess because at the end of the plaintiff's case, there are certain legal matters which I wish to take up with counsel. It will probably take us about 10 minutes. You will retire to the jury room. This will be a somewhat early afternoon recess. I am working towards something here which I will let you in on, at this time.

I have had conferences with counsel, the case is moving along very nicely, thanks to the cooperation of all counsel. Due to certain matters with which you need not con-

cern yourselves, when we recess this afternoon, we will recess until Thursday morning at 10:00 A.M. so that you may take care of whatever affairs you have to take care of tomorrow, Wednesday, and if you will be here bright and fresh Thursday morning, I will crank up all counsel so they will be ready to go Thursday at 10:00 A.M., and we will proceed to what may be a fairly long day and move it along. We have had a conference relative to our scheduling, and I think it's moving along nicely.

At this time, we will take a 10-minute recess and you will resume this afternoon. I am hopeful that we will break somewhere in the neighborhood of 4:15, as I do have other matters scheduled for 4. But I will wait for a convenient time to break. Please don't discuss the case amongst yourselves and keep an open mind on the case. Thank you.

(The jury left the courtroom.)

THE COURT: Let the record reflect that the jurors have now left the courtroom.

The Court will hear whatever motions the various defendants and third-party derendant wish to make at this time.

MR. WRENN: Your Honor, on behalf of the New Jersey Export Marine Carpenters, Inc., I move to dismiss the first cause of actionin negligence in that there is no proof at all,

as far as I can see, of any negligence on the part of this defendant.

THE COURT: Do you want to respond individually, Mr. Duffy, or do you want to wait until Mr. Wrenn finishes? It might be easier if you respond now relative to each of his points.

MR. DUFFY: On the issue of negligence, your Honor, I submit that we have established a sufficient question to go to the jury, that this was a bed constructed by these people, there is sufficient testimony for the jury to believe that they had entire responsibility for the making of the bed, and it would give rise to an inference of negligence.

THE COURT: I would believe that there is enough at this point to deny the motion. Therefore, relative to your motion to dismiss the first cause of action, Mr. Wrenn, that is denied.

MR. WRENN: I make the second motion with respect to the second cause of action, concerning itself with a breach and warranty, workmanlike quality. Again, there is no proof that this warranty was breached.

THE COURT: Mr. Duffy.

MR. DUFFY: If Your Honor please, the testimony is to the effect that the uprights broke in normal use. Absent any other consideration, this would be sufficient to hold the

defendant, New Jersey Export, liable for either breach of warranty of workmanlike performance or a direct warranty under strict liability for this equipment that they furnished and contracted, as the fabricators of it, or suppliers. The warranty is essentially the same. I think it valid on two prongs. Either as Mr. Conceicao, a beneficiary of the warranty of workmanlike performance that is owed by New Jersey Export as a marine carpenter undertaking a marine activity, plus a more direct products action against them for the construction of this pipe bed, which the proof shows to have been defective.

THE COURT: I think the testimony is that one of the uprights broke and we do have testimony from the various witnesses that an upright had not been struck by pipe coming down, which might have caused it to be broken by the intervening act or acts of the employees of the longshoreman. Under the circumstances, the purpose for which the pipe bed having been constructed, having been placed in evidence, and the fact having been demonstrated that at least one of the uprights broke through no intervening act of a third party, I would think that, again, the plaintiff has made out a sufficient case of breach of warranty of workmanlike performance to require denial of your motion to dismiss the second cause of action.

MR. WRENN: Generally, with respect to the entire

employment, I move to dismiss and move to a directed verdict on the ground that no duty owing to the plaintiff has been breached.

MR. DUFFY: New Jersey Export, in undertaking the construction of this pipe bed along with the undertaking the duty flows that all people who have legitimate business with that pipe bed must have a reasonably safe pipe bed, and it was defective.

THE COURT: In my judgment, it should have been foreseen by the carpenters that longshoremen would come and work on and in the vicinity of the pipe bed, and if the pipe bed was inadequate and one of the longshoremen was hurt as a result of an accident occurring at that time, and at that place, I should think that there would have been a duty owing to the longshoremen. There would have been a duty owing to the plaintiff, and by virtue of the breaking of this upright, I would suggest that, in the Court's view, anyway, the duty has been breached, and therefore I will deny your motion.

MR. WRENN: I respectfully except, your Honor.

THE COURT: Mr. Cichanowicz.

MR. CICHANOWICZ: May it please the Court, the defendant, Netumar, moves to dismiss the complaint first with respect to the cause of action for negligence on the ground that there is no evidence whatsoever in this case of any

negligence on the part of the defendant Netumar. There is neither any evidence of it or any evidence from which the jury could reasonably draw an inference. There is no proof of any defective condition, there is no proof of any notice or any possibility of having any notice.

THE COURT: I am a little troubled by this one, Mr. Duffy, and I'd like to hear from you because in the normal course of events, notice is a requirement where you seek to make out a case where you are claiming negligence. And in view of what happened here, the facts as they have been relayed, I should like to hear your argument or arguments relative to this initial motion made by Mr. Cichanowicz.

MR. DUFFY: If your Honor please, I would counter that with the testimony which is in conflict, that testimony of Mr. Montella in which he asserts a large part of the responsibility for the construction of these beds falls upon Mr. Piper as port captain, and that coupled with the non-delegable duty of the ship owners in negligence to furnish the longshoremen with a safe place to work, which was violated here, but this proved to be not safe. Again, the issue of the conflict in testimony I think raised such inference that would permit a jury to legitimately find that the ship or Mr. Piper was in some way negligent to have brought this about.

THE COURT: Aren't you really talking about unseaworthiness here?

MR. DUFFY: I haven't reached that point yet.

THE COURT: I know. But when you spoke as you did, negligence, it would seem to me, does require notice. As I recall the testimony of Mr. Piper, of which you read, he indicated the number of pieces of pipe that had to be carried. He thought they had a total weight of approximately 57 tons. He gave oral instructions to Mr. Montella, presumably a person of experience in this regard, to construct an appropriate pipe bed. I have some difficulty at the moment in seeing the negligence. What did he fail to do in giving instructions to Mr. Montella?

MR. DUFFY: Well, his delegation of the entire layout, according to his testimony, which does conflict with Mr. Montella's. I submit that under maritime law, he is not entitled or permitted to delegate that. He has a non-delegable duty to see that a safe place to work is provided. He is not insulated like an ordinary land contractor is required. His own negligence is of a very high order. The duty under the maritime concept of negligence is of a very high order, your Honor.

THE COURT: At this point in the case, I am going to deny your motion, Mr. Cichanowicz. Of course, you can make

it again at the close of all the evidence. I have indicated that I have problems with this particular claim. At the moment, I see it more as an unseaworthiness claim, but let's pass on to the next point.

MR. CICHANOWICZ: I'd like, in connection with the negligence aspect of it, Mr. Duffy has spoken of a non-delegable duty under negligence. I don't know of any case that so holds under negligence. Frankly, there is no evidence in this case of any negligent conduct on the part of Mr. Piper. And he ordered this from an independent contractor, and that is all that the evidence is.

THE COURT: I will tell you one that occurred to me as I was listening to Mr. Piper's testimony. It's at page 5, line 14, question, with the answer at line 17: "When you told Mr. Montella you had these 41 pieces of pipe that had to be stowed on deck, was there any further discussion?" Answer: "I didn't specifically tell him there was 41 pieces of pipe. I gave him the full booking of the vessel and left it up to him as to the number of areas he would require to stow it safely."

So that you have a situation there where there seems, at least in my mind, to be a question as to how much information which Mr. Piper should have conveyed to Mr. Montella relative to size and weight. Remember, these things would be

pushing out against the uprights, how much of that information was in fact conveyed to Mr. Montella.

Also, I wonder if you can point out anywhere where it's quite clear that the weight of the pipes, which was some 57 tons, was ever conveyed to Mr. Montella.

MR. CICHANOWICZ: Your Honor, Mr. Piper said that he gave him the full booking of the vessel, which indicates that he gave him all the cargo that was to be carried on board that vessel.

THE COURT: Where can you show me with some specificity that he told him there were 41 pieces of pipe having an aggregate weight of approximately 57 tons? I don't find it in what's been read so far. You will note, if you would, back at page 11, in answer to the question which appears at line 3, there is a question, the approximate weight would be somewhere, I guess in excess of 1 ton, since there were 47 pieces, and the overall weight was 57 tons. Answer: "According to the cargo plan, yes." Does the full booking as described on page 15 indicate that Mr. Montella was given the cargo plan, for example? Or did he give him something else which I haven't seen yet?

MR. CICHANOWICZ: Well, a full booking could only mean the cargo plan.

THE COURT: I don't really know at this point--

MR. CICHANOWICZ: I don't think we should draw inferences, your Honor. This is the plaintiff's failure of proof.

THE COURT: I think I should draw inferences at this point and let you knock them down when it comes to your case. Therefore, I will adhere to my ruling. You may proceed.

MR. CICHANOWICZ: I also move to dismiss the cause of action on unseaworthiness on the ground that there is no proof in this case that the vessel was not fitted for its intended purpose. The only thing that is proven is that these uprights broke. That doesn't necessarily establish that the vessel was not seaworthy.

THE COURT: That is an appurtenance of the ship, isn't it?

MR. CICHANOWICZ: That may be, but simply because something breaks doesn't necessarily mean that the vessel is unseaworthy.

THE COURT: It was lumber that was paid for by the ship's owners. It became an appurtenance of the ship, the way I see it. It broke when it was being loaded, so to speak, and therefore I think the inference could be drawn that it was not fit, that is, the uprights were not fit for their intended use, which was to contain this 50, or whatever number of tons it is, of pipe. I have less trouble with the unsea-

worthiness part, where there is a non-delegable duty, than I do with the negligence part, where I would agree with you. Unless you want to add something, Mr. Duffy, which you may do, I am about to rule on this matter of unseaworthiness.

MR. DUFFY: I have nothing to add, your Honor.

MR. CICHANOWICZ: Your Honor, I also want to move for a directed verdict of the entire complaint.

THE COURT: I will deny your motion to dismiss the cause of action relating to unseaworthiness, and I will deny your motion for a directed verdict.

Mr. Testa.

MR. TESTA: If your Honor please, at this time I would simply join in the motions made by Mr. Wrenn and Mr. Cichanowicz, without going into any detail.

THE COURT: Do you want to comment at all, Mr. Duffy, on the third party defendant?

MR. DUFFY: Insofar as the third party defendant moves or joins in the motion to dismiss the main case of the plaintiff, I submit that this Court, already having ruled on the main motions, I will add nothing as to that. But I submit that this puts him in peril in the assertion of what's known to the Court but not to the jury, of course, concerning the compensation lien of the third party defendant, who in the event there is a verdict in favor of the plaintiff, will

attempt to assert this. And I point out that the lien or the asserted lien for compensation reimbursement for the expenditures, which in this case was some $26,200 is an equitable lien, and I don't see in all equity and justice where on the one hand the third party defendant, ITO, can come in and try and shoot down my case, have any case dismissed, and then, if I am successful, come after me for proceeds, or come after the plaintiff. I do appreciate that the stevedore here has a concomitant risk of indemnification, which perhaps motivates it to make this motion, but where the two are balanced under the structure of the Longshoreman's Act, I think where they make such an assertion, as they have done here, they must as an equitable manner waive or he be stopped from asserting that motion. I think it's a matter of coming in with clean hands. If they are not going to get their money back, and it's really not statutory, it's equitable under the Aetna.

I think that they must be estopped to fulfill the intendment of the compensation statute that the jurisdiction worker receive compensation.

THE COURT: The motions of the third party defendant are denied.

We will take a five-minute break.

(Recess.)

(In the courtroom, in the presence of the jury.)

THE COURT: You may proceed, Mr. Wrenn.

MR. WRENN: I call William Montella.

W I L L I A M M O N T E L L A, called as a witness by defendant New Jersey Export Marine Carpenters, Inc., being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WRENN:

Q Mr. Montella, on November 5, 1970, by whom were you employed?

A New Jersey Export.

Q Would you tell me generally what your title was with them at that time?

A General Manager, head foreman, whichever.

Q Generally, what activities were you engaged in on their behalf at that time?

A To look into, oversee all marine carpentry work that was done by our company, to supervise.

Q How long have you been engaged in that business?

A Today, 22 years.

Q On November 4, 1970, did you have occasion to do any work aboard the SS MOSQUEIRO at Pier 36?

A Yes, I did.

Q Can you tell me for whom you did work aboard that ship at that time?

A For the Netumar SS Company.

Q Who did you deal with for Netumar?

A Captain Piper.

Q Could you tell me generally how it came about that you did work aboard this ship for Captain Piper? Tell me what he told you to do, etcetera.

A When the vessels come in, if there was need for carpenters, they would call us and tell us to come down. They would tell us how many men to bring in. We would go to the pier, and I would go as well. And we would find out what we have to load on the ship and commence work.

Q Prior to November 5, did you build a bed for a crib near Hatch No. 1 to hold some pipes?

A I built 2 beds. One on the port side and one on the starboard side.

Q Were they built in the same fashion?

A Same fashion.

MR. TESTA: If your Honor please, it hasn't been established which ship we are talking about, has it?

THE COURT: Yes, he did say he did work on the 4th of November, 1970 on board the SS MOSQUEIRO. So we have established this.

I'm sorry, I didn't hear the last question and answer.

(Record read.)

Q Will you tell us how you built those cribs on November 4, 1970, aboard that ship?

A It was a crib for pipe, commonly known as a pipe bed. It was constructed with 4x6 timber. The bottom timbers are laid on burton on top of the deck--

Q By "burton", will you tell us what you mean?

A This is a forward end of a ship, an aft end of a ship, and from side to side, that is called burton.

Q Going across the ship?

A Yes. A thwart ship. The timbers are placed on deck thwart ship at approximately 5-foot intervals. Then you take 4x6 timber and you place them up and down on each side of this timber laying down, like so. One on each side of that 4x6, plus a filler piece in between that 4x6.

Q What is the purpose of that filler piece?

A Just to make it stronger. Then it's all nailed together. Actually, what you have is a wooden alley-way you are looking through. Then there is a whaler placed on the bottom, a 4x6 timber.

Q What is a whaler and what is the purpose?

A A whaler is a long piece of timber used to go against and to be placed up against. In other words, if I was to take an upright, one upright here and an upright here, I would take a long timber and put it across on the bottom,

catching the two together and then brace from this whaler into the steel so that she couldn't possibly be moved. 42 inches above that, you put another whaler, which is about the center, and you place that whaler there and again you brace. So this way here you have a good strong job. Then you tie them all by 2 inch plank across all your braces so that nothing can move. If one moves, they all have to move. There is no way it can possibly be done. You make it one solid mass out of the entire job. It's very difficult to explain. Your uprights are tied together with 2" stock, 2x4 or 2x10, and they are all tied together after your whalers and your braces are placed on it. It makes it very strong. It's very difficult to explain. But it's all 4x6 sound timber.

Q Is that new timber?

A It's all new timber.

Q Did you complete that job on November 4, 1970?

A I completed the job the day before they loaded the pipe.

Q Did you actually see an accident involving Mr. Conceicao?

A Did I actually see it, no, I did not.

Q Did there come a time after the accident when you were advised that an incident had occurred?

A I would say about 2 minutes after it occurred, or

3 minutes after it occurred, somebody, you know how word is on the pipe when you are working with men, somebody got hurt at No. 1. This was the first I found out about it. I went down there, I didn't know if it was one of my men or who it is, you don't know. I went there and they had a man got hurt with the pipe. That was the extent. The man didn't get hurt very badly.

Q Was the man who was the injured person there when you arrived there?

A I didn't see him at first, but I saw him a few minutes later. I wasn't there at the time he got hurt. He was a little further away, about 15, 20 feet away.

Q What was he doing?

A Sitting down.

Q Did you at that point go over and look at the pipe bed?

A Yes, I did.

Q Did you look around at all the uprights?

MR. DUFFY: Objection, your Honor. I think at this point he is leading.

THE COURT: Yes, sustained.

Q After you saw the injured party, you went and looked at the pipe bed. Will you tell us what you observed with regard to the pipe bed?

A On the forward end of the pipe bed, the No. 1 Hatch on the offshore side, one upright was split. It was cracked. It had gotten hit by a piece of pipe--

MR. TESTA: Objection, your Honor.

THE COURT: Yes. One upright was split. I think he may have also said cracked. The jury will disregard anything after that.

MR. TESTA: I would ask your Honor to instruct this witness not to make any gratuitous comments when he is asked as to what he observed.

THE COURT: Yes, just try to answer the questions as asked, Mr. Montella.

Q In your opinion, what caused this split?

MR. DUFFY: Objection, your Honor.

MR. TESTA: Objection.

THE COURT: Sustained at this point.

THE WITNESS: There was one upright--

THE COURT: Please, when you see counsel rising, wait with your answer. If I indicate the objection is sustained, that means you are not to answer the question. If I indicate the objection is overruled, you may then proceed to answer the question. The last objection was sustained, so now counsel is doing to have to put a new question to you.

THE WITNESS: I see.

Q What, if anything, did you do with regard to that upright?

A I looked at it, and I put another 4x6 timber up against it and nailed it in.

Q Did you make any other repairs or do anything else to that bed at that time?

A No, sir, I did not.

Q Did there come a time when the pipes, when they had completed loading the pipe, when you had to come and do something else?

A After the pipe was completely loaded, it had to be lashed down and a catwalk had to be built over it.

Q Can you tell me what you mean by lashed down? What did you do there?

A Before they load pipe, you lay your wires on the deck, sticking out. The pipe goes inside and then the wire, this end is thrown over there, and this end over that, creating a round turn. And you have turnbuckles on either side, and you have to put the men in there and lash it down, making a bundle out of it. Approximately 8 lashings, depending on how long the pipe is.

Q And after you lash it down, do you put anything else down?

A Then I have to build a walkway for the men to walk

on or the stevedores to walk on, because you can no longer walk by. So you have to build a catwalk or a ramp, with hand rails, etcetera, so when the seamen are out to sea you can walk.

Q By a catwalk, what you mean is a wooden stairs going up and a path on top of this pipe, is that correct?

A Correct.

Q Did you have a conversation at this time with any of the longshoremen?

MR. DUFFY: Objection, your Honor.

MR. TESTA: Objection, your Honor.

THE COURT: Just answer yes or no.

A Conversation? I don't understand.

Q Did you talk to any of the longshoremen?

A Yes.

Q Were the longshoremen all around when you got there?

A Yes.

Q Did you hear the longshoremen talking or yelling?

MR. DUFFY: Objection, your Honor.

THE COURT: Just answer yes or no.

A Yes.

Q Will you tell us what you heard them say at that time with regard to this incident?

MR. TESTA: Objection, if your Honor please.

MR. DUFFY: Objection.

THE COURT: Yes, sustained.

Q Did you recognize the longshoremen as the longshoremen that had been working in Hatch No. 1 at that time, as the gentlemen who were there?

MR. DUFFY: Objection, your Honor.

MR. TESTA: Objection.

THE COURT: Sustained.

Q Did you talk to the winch operator?

MR. TESTA: Objection, if your Honor please.

THE COURT: Just answer yes or no.

A No.

Q Did you hear the hatch boss talking to the winch operator?

MR. DUFFY: Objection,your Honor.

THE COURT: Just answer yes or no.

A Yes.

Q What did you hear the hatch boss say to the winch operator?

MR. DUFFY: Objection, your Honor.

THE COURT: Sustained.

Q Did you recognize the hatch boss as--from being down the pier, do you know what the hatch boss for ITO looked like?

MR. TESTA: Objection, your Honor. I don't see that that has any relevancy at all.

THE COURT: He may be leading to something. I am going to let him explore the subject.

Q It's a description, not any conversations.

Do you recall what the hatch boss or hatch bosses, if there was more than one, for ITO looked like, the ones who were assigned to the MOSQUEIRO on November 5, 1970?

A I knew who the hatch boss was.

Q Did you recognize the gentleman that spoke at that time as the hatch boss?

A Yes.

Q Did you hear him say something to the winch operator?

MR. DUFFY: Objection, your Honor.

THE COURT: Just answer yes or no.

A Yes.

Q What did you hear him say?

MR. TESTA: Objection.

THE COURT: Sustained.

Q May I get the whole question out:

What did you hear him say to the winch operator?

MR. DUFFY: Objection.

MR. TESTA: Objection.

THE COURT: Sustained.

Q After looking at the upright, based upon your experience, can you give us an opinion as to the cause of the split?

MR. DUFFY: Objection, your Honor.

THE COURT: Yes, sustained. I will require that you qualify this witness in the first instance before asking him any questions which would relate to his opinion as to causes of anything.

Q Prior to November 5, 1970, how long had you been engaged in the marine carpentry business?

A 20 years.

Q During that time, did you have occasion to make repairs or to construct or to build various cribs or beds for ships?

A Yes.

Q In the 20 years, have you seen pieces of wood or timber or whatever, that have been struck--

MR. TESTA: Objection, your Honor, to the form of this question. I am going to object to it before he says it.

THE COURT: Let me hear the question. Just wait with your answer.

MR. DUFFY: Your Honor, I also join in the objection and actually to the form of the question at this time as far as it is being stated.

THE COURT: The jury will not infer anything from the question. The only evidence in this case is in the answers, and I think you realize that from what I have told you previously. I am going to permit counsel to ask whatever question he wants to, but the fact that he is asking is not evidence of any kind, nature or description. But I can't rule on a question until I have heard it.

MR. TESTA: If your Honor please, may we be heard at the side bar as to what this question is going to be?

THE COURT: No. I have already instructed the jury. They are not going to accept a question as evidence. If I sustain your objection, there will be nothing more to it. So, let's get on with the trial. I trust Mr. Wrenn will not ask any question which he knows is improper. That doesn't mean that he should be precluded from asking questions, but I know he will exercise good judgment.

Q Based upon your experience, Mr. Montella, can you, after inspecting a piece of timber or lumber, ascertain the cause of a split?

MR. TESTA: Object to that question, your Honor.

THE COURT: I will sustain the objection as to form. I think if you rephrase the question, gentlemen, and I want you to know this, I will probably allow an answer here, and then leave it to the jury as to how much weight they will

give the answer. But, at the moment, I say to you the question is objectionable as to form. They may give it much weight, or little weight or no weight.

Q Mr. Montella, based upon your experience, are you able, after looking at the split piece of timber aboard the ship on November 5, 1970, can you or do you have an opinion as to the case of that split?

MR. DUFFY: Objection, your Honor.

THE COURT: Just answer yes or no.

Q What was the cause of that split, in your opinion?

MR. TESTA: Objection, your Honor.

THE COURT: I will sustain the objection as to form. Let me state with a fair degree of certainty, perhaps, as you do with the doctor.

I am going to remind the jury that this is something from a witness who has seen something. It's his opinion. His opinion will be weighed by you when you come to deliberate in the case. If you ask a proper question, I am going to permit you to get an opinion.

Q Can you tell us with a reasonable degree of certainty the cause of the split?

MR. DUFFY: Objection.

MR. TESTA: Objection, your Honor.

THE COURT: Overruled. I am going to overrule it.

The weight of the answer is to be decided by the jury.

MR. TESTA: If your Honor please, I think we are entitled to a voir dire on this at this time.

THE COURT: All right. I will permit a voir dire. Either or both of you may do it.

MR. DUFFY: My objection at this point is that there has been no foundation laid for the question.

MR. TESTA: That is also my objection. There is no qualification of this man as an expert.

THE COURT: If you want to have a voir dire on his qualifications, which will again go to the matter of weight in a large measure, as to whether I permit him to answer these types of questions, I will permit that. That is what I am going to do now, permit a voir dire.

MR. DUFFY: I will defer to Mr. Testa.

THE COURT: Mr. Testa, you may now inquire of the witness on a voir dire of his qualifications as an expert. This, of course, goes to the weight you will ultimately give to the testimony of this witness as an expert.

VOIR DIRE EXAMINATION

BY MR. TESTA:

Q Mr. Montella, how old are you?

A 37.

Q You have been in this business for 22 years? I

believe that is what you said?

A Yes, sir.

Q Did you start when you were 15?

A 14.

Q How many such pipe beds have you built in your time?

A Better than a hundred. Way better.

Q How many times have you seen damage of any kind?

A Very, very few times.

Q Very, very, very few times, is that correct?

A Correct.

Q That is three very "veries", is that correct?

A Correct.

Q What does that mean, that you saw it once before?

MR. WRENN: I object unless we say what damage of kind.

Q I am talking about damage of any kind to a pipe bed that you constructed or had anything to do with.

A I don't recall any, actually.

Q You don't recall any damage?

A No.

MR. TESTA: If your Honor please, at this time I press my objection. This witness has said he has never seen damage to a pipe bed, and he is now being asked to give expert opinion as to what caused it.

THE COURT: Let me hear from you, Mr. Wrenn.

DIRECT EXAMINATION CONTINUED

BY MR. WRENN:

Q Did you ever see any damage to uprights, sir?

A Yes.

Q How many times have you seen damage to uprights?

A Many times.

Q On occasion, have you seen what caused the damage to uprights?

A Yes, I have.

Q On occasion, have you gotten there after the uprights have been damaged?

A Yes.

Q Based upon these many, many experiences, can you tell us on this particular occasion what caused the split in this particular upright?

THE COURT: Just answer yes or no at this point because Mr. Testa may not be finished.

A Yes.

THE COURT: All right. Mr. Testa, do you want to inquire further in your voir dire?

MR. TESTA: Yes, your Honor.

VOIR DIRE EXAMINATION

CONTINUED BY MR. TESTA:

Q Didn't I understand you to say that you had never seen damage to a pipe bed before this, Mr. Montella? Didn't you just tell me that before Mr. Wrenn got up?

A What I said was the pipe bed that I built I saw no damage to the bed.

Q You never saw damage to any pipe bed that you built?

A To the pipe bed.

Q Aren't the uprights a part of the pipe bed?

A A small part.

Q But they are part of the pipe bed, aren't they?

A Correct.

Q And when you never saw damage to a pipe bed, that includes the uprights, doesn't it?

A Not necessarily.

Q Doesn't it include the uprights?

A Not necessarily.

MR. WRENN: I object, your Honor.

THE COURT: I think he is finished. Let's get on. I know Mr. Testa doesn't intend to conduct his cross examination at this time.

MR. TESTA: I don't, your Honor, but I intend to press my present objection to this witness giving an expert opinion on the basis of this voir dire where he has said

he saw no damage to the pipe bed, including the uprights.

THE COURT: I will ask you some questions.

BY THE COURT:

Q I believe you indicated that from age 15 you have been engaged in doing carpentry work?

A Yes.

Q That includes working with wood?

A Yes.

Q And constructing things made of wood?

A Yes, sir.

Q And reparing things made of wood?

A Yes.

Q And you have seen situations where wood has been broken or split, have you not?

A Yes, your Honor.

Q Are you able to tell from looking at a piece of wood that has been broken or split the cause of the break or the split?

A Your Honor, I have to answer that part in two parts.

Q Go ahead.

A If an upright or an object is used for a certain type of work and she's broken in a certain way, you know it can only happen from that particular way. But if I see a piece of wood on the ground, or two pieces, I can't tell you

how that has been broken. But if I knew what that piece of wood was before it was broken, perhaps I could. In this instance, I can.

Q You mean if you know where it was placed and how it was being used?

A Yes, your Honor.

Q You think you could, with a fair degree of certainty, tell us the cause of the break?

A Yes.

MR. TESTA: Again I press my objection because here the witness has said by looking at a piece of wood he could not tell what caused the break, and he is only going to draw some inference now because of where the piece of wood was and how it was used on this ship. Again I say there is no foundation for taking expert testimony from this man, which would be purely a guess, which would not even be testimony.

MR. DUFFY: I join in that objection, your Honor.

THE COURT: The objections are overruled. I will permit further questions in this area, and I will permit counsel to elicit an opinion. And I will advise the jury once again that the weight of Mr. Montella's opinion will be for you and you alone to determine. You may, based on his background and experience, the chance he had to observe this

particular wooden member, you may give his testimony no weight. You may give it little weight, you may give it some weight, you may give it a great deal of weight or you may accept it as the gospel. I will leave that to you.

If you put a proper question to the witness, Mr. Wrenn, I will permit an opinion to be elicited from this witness.

DIRECT EXAMINATION CONTINUED

BY MR. WRENN:

Q Mr. Montella, based on your experience and after looking at this split upright on November 5, 1970, do you have an opinion, with a reasonable degree of certainty, as to the cause of that split?

A Yes.

Q Will you tell the jury what the cause of that split was?

MR. DUFFY: I object, your Honor.

MR. TESTA: I object, your Honor.

THE COURT: Overruled. This is an opinion. He didn't see it.

A My opinion is while a pipe was being picked up from the offshore side, she swung while she was in the air, she swing and hit the last stanchion on the pipe bed, causing that stanchion there, she cracked. She was struck. And there

was markings in the timber also, round markings where the timber was struck. That is how I knew the pipe struck the timber.

Q Could you tell us how the pipes looked? In other words, what was the position of the pipes when you got there?

A Fore and aft.

Q What I meant was, were any of the pipes--

MR. DUFFY: I object.

THE COURT: Yes. Don't lead, of course.

Q Could you describe the position of the pipes with regard to the bed when you got there?

A When I got there, the pipes were in the bed. I have to say they were on the ground. They were fore and aft, they were on the ground. They nestled in a little bit with the stripe, she had a tendency to nestle in, tighten up. The bed was sufficient, I just took another 4x6, put it in it and it was okay.

MR. TESTA: If your Honor please, I am going to move to strike the last part of that answer as unresponsive.

THE COURT: Yes. The last part of the answer to which Mr. Testa has objected will be stricken as not responding to the question which is pending. You may proceed, Mr. Wrenn.

Q Could you tell us about how high the uprights were

off the deck?

A The entirety of the bed was 5 feet high. But the bed itself inside measurement, because you are losing 6 inches on the bottom, was 4 feet 6 inches high.

Q If I stood outside, the upright would be 5 foot, is is that right?

A 5 foot.

Q But I only have 4 and a half feet--

A Inside measurement, you have, because you lose 6 inches on the bottom where your wires pass through for your lashings.

Q Was it necessary for any of the pipes to be moved in order for you to do whatever work you did to repair the bed?

MR. DUFFY: Objection, your Honor.

THE COURT: Yes, you are leading. Sustained.

Q In order for you to repair the bed, did anything have to be done?

A No.

MR. WRENN: Your Honor, may we approach the bench for a moment?

THE COURT: Yes.

(At the Side Bar.)

MR. WRENN: I don't want to belabor the point with

the conversation between the hatch boss and the winch operator, and may I know the basis of your sustaining the objections? Maybe I can correct it because he heard a conversation between the hatch boss. The hatch boss was brought in here as a witness and I'd like to --

THE COURT: First, you haven't identified the individual. You call him a hatch boss. I don't know whether his name was Jones or Smith--that is the first order of business. And I think until you identify the individual more than by just a designation, you have yourself a problem. And that is the first order of business. Let's assume that the witness identifies Mr. Ratliff--

MR. TESTA: If your Honor please, I don't think this discussion should be conducted in the hearing of this witness.

THE COURT: Yes. Mr. Montella, would you just step down into the audience part of the courtroom and we will have our discussion here. Just bear with us a couple of minutes, ladies and gentlemen.

(Witness steps down.)

THE COURT: I think that is a problem right there. That was the primary reason I sustained your objections. When you said the hatch boss. Also, I would suggest that if Mr. Testa has any other objections, he can articulate them.

But your big problem in the first instance is that, and I don't think you can cure that by anything.

MR. WRENN: He doesn't know his name, but he does know that this fellow was the hatch boss for ITO for Hatch No. 1.

THE COURT: Can he testify he saw him here today, he saw him on the stand? No.

MR. DUFFY: As I recall the deposition, he couldn't identify him at all.

THE COURT: I think right there you have an insurmountable problem.

MR. TESTA: It's also hearsay, your Honor.

THE COURT: If he identified him, since it might be argued that he is the managing agent for you, his statements might be accepted in the nature of admissions by ITO. That I will tell you. But at the moment, I am hung up on the identification.

MR. WRENN: I can't. All right.

THE COURT: If you can't do it, that is the reason.

MR. WRENN: I would if I could, Judge.

THE COURT: All I can tell you is that is the basis for my ruling. Do you wish to except to it?

MR. WRENN: Yes, sir.

THE COURT: You have your exception.

(In Open Court.)

THE COURT: You may resume the stand.

(Witness resumed the stand.)

MR. WRENN: I have no further questions.

THE COURT: Thank you, Mr. Wrenn.

You may proceed with cross examination.

CROSS EXAMINATION

BY MR. DUFFY:

Q Mr. Montella, where were you when you were notified an accident took place on that date?

A On the ship.

Q Where on the ship, sir?

A I do not recall.

Q Do you know what hatch you were at?

A I do not recall.

Q Do you know if you were up in the house on the ship?

A I don't understand the question.

Q Do you know at that time if you were up in the house on the ship?

A Inside the ship?

Q Yes.

A No, I was not.

Q Do you know what time of day you were notified?

A In the morning.

Q What were you doing when you were notified?

A Supervising a job.

Q What specifically were you supervising?

A Marine carpentry.

Q Where?

A On board the MOSQUEIRO.

Q Where on the ship?

A On deck.

Q On deck in the vicinity of where?

A I cannot answer that.

Q Who were you supervising?

A Carpenters.

Q Specifically which men were you supervising?

A I do not recall.

Q What job specifically were you supervising?

A Any securing of any cargo that had to be done.

Q At the time you were notified of the accident, what job were you supervising?

A I do not recall.

Q Who notified you?

A No one directly. It was just when a man gets hurt aboard a ship, everybody knows about it.

Q You don't recall what you were doing at that time?

A No.

Q And you don't recall who notified you?

A No.

Q You don't know where you were?

A On the ship, I do not know where I was. Aboard the ship.

Q When you were on the ship, do you do any of the physical labor, the nailing?

A No.

Q Your men use nails and hammers, is that correct?

A Nails, hammers, wrenches, axes.

Q What specifically was told to you in this notice of the accident taking place?

A A man got hurt up at No. 1.

Q You proceeded to No. 1 Hatch, is that correct?

A Correct.

Q How did you get up there?

A I walked.

Q From where did you walk?

A From wherever I was.

Q Do you remember what route you took?

A There was only one route. On deck. You walk on deck of the ship.

Q Which did you go, port side or starboard side?

A I believe I went port side.

Q You don't know where you were, though, when you started?

A No.

Q How long did it take you to get up there?

A After I found out there was an accident, I'd say about a half a minute.

Q You did not see the accident?

A No, sir.

Q I believe you testified you got to the scene of the accident about 2 minutes after it happened?

A That is what I said, 2 minutes. I said half a minute now, 2 minutes.

Q What time of day did the accident happen?

A It was in the morning, I don't recall.

Q What time of day were you notified?

A Approximately 2 minutes, they say, after the accident. I don't know. It could have been 5, could have been 10.

Q Are you changing your answer now?

A No, I am not. I was at the scene of the accident the moment I heard it happened. It took me half a minute or two minutes, I don't recall.

Q But you didn't see the accident?

A No, sir.

Q You didn't know what time you were notified, is that correct?

A That is correct.

Q How can you tell us you got there two minutes after it happened?

A I said I got there two minutes after I heard it happened.

Q Where did you stand when you got up to No. 1 Hatch?

A I stood aft of the pipe.

Q On the deck?

A On the deck. Then I climbed over the pipe to look at the damage. You couldn't walk on the side of it, it was too close.

Q What side of the ship did you come up on?

A I believe it was the port side.

Q What side of the ship was the accident?

A She was facing inshore, I believe that was port side also.

Q All the testimony to date has been that that was the inshore side, which was the starboard side.

A It was the offshore side.

Q You are absolutely certain that it was the offshore side, that is where it took place?

A Pretty sure.

THE COURT: The ship was facing bow in, was it?

THE WITNESS: Bow in.

THE COURT: Was the ship on the north or the south side of the pier?

THE WITNESS: Your Honor, I believe it was on the north side, but I always get confused with north and south in the terminals. I work many terminals.

Q Pier 36 always has a north-south quay, doesn't it, string piece pier?

A Yes.

Q But this was on an end, is that correct, the MOSQUEIRO?

A I don't know what you would call the type where she was. I don't know the berth number. I work many terminals. I go there when there is a ship there. What berth that was, I don't recall. I don't even know.

Q But you are certain that the damage and the pipe bed was on the port side?

A I'm almost quite sure.

Q When you say you arrived there and you observed the pipe cargo, it was in place in the bed, is that correct?

A Correct.

Q Was there another bed on the other side of the hatch?

A Yes.

Q Was there any cargo in that other bed at the time you say you arri ed at the scene of the accident?

A Not that I recall.

Q And you say generally that this cargo was lashed down in this bed where the accident happened?

A It was.

Q This was lashed down by your men?

A Yes.

Q Were you there when the lashing was done?

A Yes.

Q About what time of day was that done?

A I think it was finished by 2 o'clock.

Q That is the lashing?

A I'm pretty sure.

Q And you lashed down that pipe cargo as you found it there in that bed at that time, is that correct, you and your men?

A Yes.

Q How long did you stay up at the No. 1 Hatch when you got up there?

A At the time of the accident?

Q Yes, sir.

A Maybe 10 minutes.

Q And then where did you go?

A Back to work.

Q Where did you go back to work?

A All over the ship.

Q Do you remember specifically where you went after you left the scene of the accident?

A At this time I couldn't tell you specifically.

Q Did you see Mr. Conceicao leave the ship?

A No.

Q Do you know by what means Mr. Conceicao left the ship?

MR. WRENN: I object, your Honor. If he didn't see him, how could he know by what means.

THE COURT: Did Mr. Conceicao ever tell you how he left the ship, yes or no?

THE WITNESS: No.

THE COURT: All right. Why don't we proceed.

Q Where did you first observe Mr. Conceicao, or the injured longshoreman, when you went up to No. 1 Hatch?

A Forward end of No. 2.

Q More specifically, at the forward end of No. 2, can you identify where he was with regard to location or otherwise?

A Sitting down on deck.

Q Port side or starboard side?

A You got me confused now, port or starboard. He was on the offshore side, right behind the pipe.

Q Prior to the accident, had you been up to No. 1 Hatch that morning?

A Yes.

Q At what time, sir?

A If I am not mistaken, about a quarter past 8.

Q How long did you stay up there?

A Long enough to look over the job that we did the day before.

Q How long is that, sir?

A About 15 minutes.

MR. DUFFY: That is all I have, your Honor.

THE COURT: Thank you very much.

Mr. Cichanowicz.

CROSS EXAMINATION

BY MR. CICHANOWICZ:

Q Mr. Montella, are you familiar with what is called the stowage plan?

A Very much so.

Q Is that something that you use in connection with your work as marine carpenter on board ships?

A Sometimes it is, sir.

Q In this case, were you shown a copy of the stowage

plan for the MOSQUEIRO?

A No, sir.

Q I think you testified that before you built this pipe bed you were told what you would have to load on the ship, is that right?

A The normal operations are to go into the port captain's office because he orders you and to ask him what he wants performed. He, in turn, tells you what he wants you to begin. He himself doesn't know what he is going to get because all the cargo is not booked or it's still coming in, so you play it by ear.

Q May I interrupt you, Mr. Montella. If the cargo is already at the pier, do you get the information as to what is there?

A He will tell me, you have so many tractors, you have pipe, you have this and you have that. That is as far as it goes.

Q The only time that the port captain can't tell you what he has to load on board the ship is if it pertains to cargo which has not arrived at the pier as yet, right?

A Correct.

Q And if the cargo is on the pier, then that is information that the port captain either gives to you or that you can obtain from documents which he has in his office, is that

true?

A Well, I don't look at his documents.

Q But you get that from the port captain?

A Verbally.

Q As a matter of fact, you can see it if it's on the pier, is that right?

A Correct.

Q Or if it's on a lighter, you can see it also, is that right?

A If it's there?

Q Yes, if the lighter is there, obviously.

A Correct.

Q In this case, do you know if the pipe that you were to construct the pipe bed for was already at Pier 36?

A I do not recall if it was already there.

Q Do you remember on what day you started construction of these pipe beds?

A The day before. The day before they were loaded.

Q When you say the day before it was loaded, you mean on November 4?

A Obviously, that must be the day, if he got hurt on the 5th.

Q Of course, Mr. Piper didn't tell you how to construct the beds, did he?

A No.

Q How about the lumber that was used for these pipe beds, where was that obtained?

A From New Jersey Export's yard.

Q And the work of building these pipe beds, who supervises that?

A I do.

Q In other words, insofar as Netumar is concerned, you were the expert in building the pipe bed, is that right?

MR. WRENN: I object to that, your Honor.

THE COURT: Sustained.

MR. CICHANOWICZ: Withdraw the question.

Q And Mr. Piper doesn't tell you what type of lumber to order, does he?

A Mr. Piper tells you every nail you take, every nail you take. Mr. Piper tells you what to bring in, what not to bring in, how much to spend and everything else. Let's get it straight.

Q He tells you what nails to use?

A Mr. Piper tells you everything, for the simple reason that after the ship is completed, they are always complaining about the bills.

Q Mr. Montella, do you remember testifying on January 9, 1972 at our office, 80 Broad Street, in connection

with this case?

A I remember, yes.

Q In fact, have you read this testimony?

A I browsed through it.

Q Did you read it this morning?

A No, I did not.

Q Do you remember being asked these questions and giving these answers:

Page 39, Line 18: "Insofar as Mr. Piper was concerned, he did tell you how to make the bed or what to use, did he? Answer: Mr. Pipe tells me, 'Make a pipe bed.' I ordered 4x6's. Any time you order lumber, they want to know why you are ordering lumber and of what size, what dimensions for pipe beds.Q.In other words, he does not tell you what type of lumber to order? A. No. Q. Where did you get the lumber? A. From our yard. Q. He did not tell you how to build it? A. The pipe bed? Q. The pipe bed. A. No. Q. He didn't tell you what nails to use, did he? A. No."

Were you asked those questions, and did you give those answers?

A Oh, definitely. But you are phrasing it completely differently. Now you are saying the size of the lumber or how much lumber. You are asking me two questions and you're being

quite cute about.

Q You are saying I am being cute about it, about being asked by Mr. Piper?

A Yes, sir.

MR. CICHANOWICZ: Is the original here of Mr. Montella's testimony?

THE COURT: Yes. I have what is denominated the original. (Handing.)

Q Mr. Montella, you, of course, read the English language, don't you?

A Somewhat.

Q On Page 42, is that your signature?

A Yes, that is.

Q Before you signed it, did you read it?

A Yes, I did.

Q And did you read the questions and the answers which I just read to you?

A Yes, I did.

Q You didn't change those, did you?

A The answer and the question were different. What I said there was asked differently and I explained it to you differently, but truthfully.

Q You mean the intonations of the voice when the questions were asked were different?

MR. WRENN: Your Honor, I can't hear. If counsel will come back here.

THE COURT: Counsel is moving back now. We will have the question read back by the reporter and the witness can complete his answer.

Q You mean the intonations of the voice on this examination were different than they are here today?

A No, sir. What I am saying is this: To be very specific about it, we all know that when you make a pipe bed you use 4x6 timber. So that is not in question. We know we use 4x6 timber. However, when I say he is concerned about everything we use on the pier, they are concerned about everything we use on the pier. He didn't say whether a 10-penny nail or a 60 penny nail because they cost the same. So, if I order nails, whether it's a 10 penny nail or 60 penny nail, the case is the same. Mr. Piper is very concerned about what we use on the terminal because it's his company's expense. If he told me to make a pipe bed, you have to have the material. So, you get the 4x6 timber and the 60 penny spikes and you do it. After the job is done, they say you spent a little too much money, always. That is what I am saying. Insofar as him telling me what to build it with, he didn't tell me. He didn't have to.

Q In other words, you ordered the lumber which you

felt was needed for the pipe bed?

A Which I knew was needed.

Q When you say he complains and wants to know what nails you use, etcetera, all he is concerned about is that money is not wasted, is that correct?

A That is correct. That is what I meant by that.

Q Even though you say that on occasion he has said to you that too much money was spent, they still pay the bills, don't they?

A A little late, but they pay.

Q They pay them, don't they?

A That I wouldn't know. You'd have to take that up with someone else.

MR. CICHANOWICZ: I have no further questions.

THE COURT: Thank you, Mr. Cichanowicz.

Mr. Testa.

MR. TESTA: If your Honor please, it's now 4:10. I don't know whether you want me to start now.

THE COURT: I most certainly do, sir. You delayed us a bit before, and I didn't hear any apology from you, and it seems to me you know what my schedule is to be, and at this point, I would suggest you proceed immediately.

MR. TESTA: All right, I will.

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. Montella, this accident happened November 5, 1970, didn't it?

A Yes.

Q When was the first you spoke to Mr. Wrenn about this?

A I don't remember the exact date. It was sometime later than that. I don't recall the date.

Q Did you speak to him in 1970?

A Not that I know of, no.

Q Did you speak to him in 1971?

A I don't even know if it was 1971 or 1972, I don't know. The first time I know is when they called me up the very first.

Q Did you speak to him when you went to this examination before trial?

A Yes, I did.

Q You spoke to Mr. Wrenn, right? That was held on January 9, 1972, wasn't it?

A If that is the date.

Q And since that time, have you spoken to him?

A No, I haven't. I just met him outside the door today.

Q Just bumped into him, accidently, outside the door?

MR. WRENN: I object.

THE COURT: Sustained.

Q When did you speak to Mr. Wrenn before you came into this court house today?

A Right outside that door for about two minutes. He walked in, I sat outside.

Q Did he ask you to come here today?

A Of course.

Q Did you speak to him between January of 1972 and today?

A No, sir.

Q Do you remember being asked these questions and giving these answers at an examination before trial, on page 8, line 7: "Question: Do you know if you or New Jersey Export did any marine carpentry on the MOSQUEIRO in November of 1970, the early part of November? Answer: I recall this incident that I am here for today. But if you were to ask me without mentioning that incident, if I worked on that ship that day, I couldn't possibly be able to tell you, I'd be lying."

A Correct.

Q Do you remember that?

A Correct.

Q That is what you said in 1972?

A Correct.

Q When did you become an expert, Mr. Montella?

MR. WRENN: Objection, your Honor.

A I'd like to answer that.

THE COURT: No, please. Sustained. Just as when Mr. Wrenn was asking questions and they were sustained, the same rules will prevail here.

Q You are not an engineer, are you?

A No, sir.

Q In your experience, how many times have you seen an upright that was hit by anything?

A Are you asking me how many times I saw an upright hit by anything?

B By anything, yes, that is what I am asking you.

A A few times.

Q How many?

A A few times.

Q How many times before November 5, 1970 did you see an upright that was hit by any kind of an object?

A You want me to give you exact, like a date, an exact number? I can't.

Q Yes, I'd like you to tell me when and where you saw this happen before Novemb r 5, 1970.

A You want me to tell the truth?

Q Absolutely, I want you to tell the truth.

A Then how can you expect me to give you a day and

date and where? I do a hundred ships every month. You are asking me to give you an exact date of something that happened. I mean--

Q That is right. That is what I am asking you.

A I will give you a date, July 24, 1970. That is exactly the answer--that is what you want me to do. That is what you are forcing me to do. I want to tell you the truth. I have seen uprights struck many times. However, if I am going to sit here and tell you it was July 3rd at 3 in the afternoon, I can't do it, I'm sorry, sir.

Q You cannot recall any date or any ship or any previous experience when you saw such a thing happen?

MR. WRENN: I object to that, your Honor.

THE COURT: He's already said he can't recall a specific date. He said first--never mind. Proceed. Sustained.

Q When you were asked if you were shown two pieces of wood that were broken, whether you could tell in your opinion what caused that break, you said you couldn't, didn't you?

A That is correct.

Q So, if I took two uprights out of the pipe bed and showed them to you, and they were both broken and I asked you in your opinion what caused that break, you couldn't tell me, could you?

A If I knew they were uprights from a pipe bed, and I

could see the way they were broken.

Q If I showed you two pieces of wood that were taken out of the pipe bed and I didn't tell you what they were, and I asked you if you could tell me what caused the break, you couldn't tell me, could you?

A Definitely not.

Q The only reason you offered that opinion that you offered before was because you were told they were uprights in a pipe bed, isn't that so?

A No, it isn't so.

Q You don't have the vaguest idea of what happened, do you?

A Yes, I do, because I know my business and I know what happened, but you won't let me tell you what happened.

Q You didn't see anything happen to that upright, did you?

A Did I see it get struck, no.

Q And you're only basing that opinion that you gave because it was an upright in the pipe bed?

A That is true, that and the concave of the mark on the pipe bed.

MR. TESTA: I move that that last portion be stricken.

THE COURT: Yes. The jury will disregard that last

part of the answer as not responsive to any pending question.

Q And your opinion was not based on anything other than mere speculation because that was an upright in a pipe bed, isn't that so?

MR. WRENN: I object to that. That is the third time, and it's not accurate, the statement that counsel is making.

THE COURT: Sustained.

Q You had no basis for making that statement, did you, Mr. Montella?

A Pardon me?

Q You had no basis for making that statement, you didn't see anything hit that upright, did you?

MR. WRENN: I object to it. That is two questions.

THE COURT: Yes. There are two questions. If you'd like to break them down, Mr. Testa, you may. I will sustain an objection to form.

Q First of all, I said you had no basis for making that statement, did you?

A I am no ulterior gain to make a statement.

Q No ulterior gain, is that what you said?

A I had no gain to make.

Q You had no basis for making that statement, no

basis in fact, did you?

A No, like I said, only the concave in the lumber.

Q What?

A I said no, I had no fact other than what I saw.

Q That is right. There was no basis in fact for the opinion that you gave, isn't that correct? Isn't that so?

A Correct.

Q Right. And you didn't see anything hit that upright, did you?

A I wasn't there.

Q No, you were not there, that is correct.

Which upright was it that was broken?

A The furthest upright forward on the offshore side.

Q Exactly where was it located?

A Forward of No. 1 Hatch.

Q I understand forward--

A Port side, offshore side.

Q Port side?

A Port side, I believe it was port side. I said that before, port side. Could have been starboard. I think it was port.

Q Was it the one near the hatch coaming or the one near the railing?

A Near the railing.

Q Was it broken in half?

A No, sir.

Q Did it have a split in it?

A Yes, sir.

Q Where was the split?

A On the 6-inch side.

Q On what side?

A The 6-inch side. There is a 4-inch side and a 6-inch side. The split was on the 6-inch side.

Q Which way does the 6-inch side face?

A Forward and aft.

Q Was it on the forward side of the 6-inch side or the aft side?

A It was on the forward and aft side. Your 4x6 is like so, right? This is your 6-inch side, that is your forward end, the aft end. The crack was down the middle, it was on both sides.

Q How big a crack was there?

A About 22 inches, 24 inches.

Q 24 inches long?

A Yes.

Q Was that upright standing up or was it lying over on its side?

A Standing up.

Q Was it in the same position you put it in when you built that pipe bed?

A No, sir. A little crooked.

Q In what way was it crooked?

A Aft.

Q It was leaning aft, you mean?

A Aft.

Q How much aft of its original position was it?

A About 6 inches.

Q When you made the repairs, exactly what did you do?

A The only repairs I made there was to take another 4x6, put it up alongside of it and spike it into the whaler. There was no damage, just the one leg that was pushed over and cracked, and caused the pipe to shake and come down a little deeper.

Q Did I understand you to say all the pipes were still in the pipe bed?

A Definitely.

Q Were any of those pipes on the hatch?

A No, sir.

Q After you put another upright in position, you then proceeded to put the lashings on this cargo, didn't you?

A Not at that moment, no.

MR. WRENN: Are we talking about immediately?

A No, not at that moment.

Q When did you do it?

A We put the other leg in. I walked away, the stevedores, whatever they were doing there, there was a man hurt or whatever it was, the gang didn't go back to work, they had to land the other top draft--

Q All I asked you was when you put the lashings on, Mr. Montella.

A When all the pipe was loaded, we went there and put the lashings on immediately afterward, for safety precautions.

Q When was that on November 5, 1970 that you did that?

A We started approximately, I don't know if it was-- no, we are getting to lunch-time. When we come back from lunch, 1 o'clock.

Q You put the lashings on tightly and securely?

A Yes, sir.

Q You had no problem doing that?

A None whatsoever.

Q You put a walkway or catwalk right over those pipes?

A Yes, sir.

Q Right over the top of those pipes?

A Yes, sir.

Q Right down the middle of those pipes?

A Might have been off a bit, but it was down the middle.

Q The walkway has to be flat, doesn't it?

A Yes, sir.

Q You put it right down on top of those pipes?

A Yes, sir.

Q Did you put up a good walkway?

A Always do.

Q I believe you said that the pipes were in the bed and they were okay when you got there, right?

A Yes, sir.

Q You thought they were okay?

A Like you said, I'm not an engineer, but I thought they were okay.

Q You don't have to be an engineer to look at pipes, do you?

A That is right --

MR. WRENN: I object to that.

THE COURT: Sustained.

Q I believe you also said you didn't have to move any of those pipes after that?

MR. WRENN: I object to his line of questioning. It's been repeated about 4 times. Just on the basis of repetition.

THE COURT: I assume that Mr. Testa is trying to make a point. If he will get on and not repeat after this,

overruled. You may answer the question, if you can, sir. Do you have it in mind? If not, I will have the reporter read it to you.

THE WITNESS: I believe he asked me if I had to move any of the pipe.

A I didn't have to move any of the pipe.

Q Generally speaking, when you made this pipe rack, you knew the number or weight of the pipes involved, didn't you?

A No, sir.

Q Did you have any idea at all how many pipes were going to go in that bed?

A No, sir.

Q Or what they weighed?

A No, sir.

Q How do you know what size pipe bed to make?

A When you make a pipe bed, you make it, you take as much room as you can wherever they tell you. No. 1 is narrower, No. 2 is wider, No. 3 is wider than that. When you make a pipe bed, you make it as close to the water table and as close to the coaming coping as possible. This eliminates your prong braces and gives you short braces, which gives you more strength. They said make 2 pipe beds, port and starboard of No. 1 Hatch, that is what we did.

Q Did they tell you to make 3 pipe beds?

A No, sir.

Q Did you make 3 pipe beds?

A No, sir, I did not.

Q Then you only made 2, one on each side of the Hatch No. 1?

A Yes.

Q It doesn't matter how much pipe is involved, you always make it the same size and shape?

A I make the pipe bed according to what they tell me, Make a pipe bed No. 1, I make it. This is up to the port captain. If he asks for 3, I make 3. If he asks for 6, I make 6.

Q No, my question to you is regardless of the amount of pipe or the weight or anything, you always make the same size ship and strength pipe bed?

A Not the same size because the width is different on every ship and every hatch. The height, I do nothing over 5 foot.

Q Were you subpoenaed to come here today, sir?

A No, sir.

Q Are you being paid for your appearance in Court today, Mr. Montella?

A I didn't even give it any thought.

Q Who do you work for now?

A Quinn Lumber.

Q Did anybody promise you anything for your appearance in court today?

A He owes me a lunch, that's about it.

Q Have you been promised any money, not just a lunch, Mr. Montella?

A No, sir, of course not.

Q Do you expect to get any money for your appearance today?

A If they send it to me, I will be glad to take it.

MR. TESTA: Thank you.

THE COURT: Thank you, Mr. Testa.

Mr. Wrenn, do you have any questions?

MR. WRENN: No, I don't think so.

THE COURT: Anyone else? Thank you.

Mr. Cichanowicz?

MR. CICHANOWICZ: I have just one.

RECROSS EXAMINATION

BY MR. CICHANOWICZ:

Q In this testimony which you gave on January 9, 1972, Mr. Montella, page 29, line 2, were you asked this question and did you give this answer? "Question: You made no inquiry of him as to how much pipe was going into the bed?

Answer: I built the pipe bed on deck. No matter what size pipe, diameter pipe or length pipe goes into that bed, the way I make a bed it will hold anything. Sometime too strong, but never not strong enough."

Did you so testify?

A I certainly did.

Q So as far as you are concerned, you don't have to know the weight of the pipe to construct the pipe bed that you construct, is that correct?

A That is correct.

MR. CICHANOWICZ: Thank you.

REDIRECT EXAMINATION

BY MR. WRENN:

Q You build a pipe crib according to the characteristics of the ship, is that correct?

A That is correct.

Q If you have 10 feet here, you build it that way so you can get the support from the ship, is that correct?

A That is correct.

Q With regard to your opinion, is there a fact upon which you based your opinion that this upright was hit by something?

MR. TESTA: Objection.

THE COURT: Sustained.

MR. WRENN: That is all. Thank you.

MR. CICHANOWICZ: I'm sorry. One question.

RECROSS EXAMINATION

BY MR. CICHANOWICZ:

Q When you build your pipe bed as you said, 5 feet high, will that hold any pipe that's loaded within that area?

A It will. However--

Q No, the question is, will it, yes or no?

MR. WRENN: No, I object, your Honor. He shouldn't be bound--

THE COURT: Of course he shouldn't be. Let him answer the question the best way he knows how.

A Firstly, to answer your question, sir, the pipe bed will hold pipe usually that go over. They crown it up--

MR. TESTA: I am objecting, your Honor.

THE COURT: Please, don't both talk at once. You have an objection, Mr. Testa?

MR. TESTA: Yes, your Honor.

THE COURT: If so, make it.

MR. TESTA: I do. I am making an objection to this witness volunteering information that is not responsive to Mr. Cichanowicz's question.

THE COURT: All right. Let's strike the last answer and let's have the question put once again to the witness and

try to answer the question to the best of your ability.

(Question read.)

A It will, even though I don't like to do it.

MR. TESTA: All right. He's answered the question.

THE COURT: Any other questions, gentlemen?

MR. TESTA: No, your Honor.

REDIRECT EXAMINATION

BY MR. WRENN:

Q If the pipe is loaded above that 5-foot area, will it hold the pipe?

MR. TESTA: Objection, your Honor. There is no such testimony in this case.

THE COURT: That is correct, there is none.

Q When you got to Hatch No. 1 and you looked at the crib, did you also look at the pipe?

MR. TESTA: I am going to object to this, your Honor, as improper redirect examination now.

MR. DUFFY: The witness has already testified to this, your Honor.

THE COURT: Yes, I know he has, but Mr. Cichanowicz did ask a couple of questions. I am going to permit 1 or 2 questions, but I would hope that they would be on point.

Q When you got there, did you observe the pipe?

A Yes.

Q Did you see how high the pipe was loaded?

A Yes.

MR. TESTA: Objection, your Honor.

Q How high was it loaded?

MR. TESTA: Objection.

THE COURT: Overruled.

A The pipe was very high.

Q Was it higher than the upright?

A Much higher.

THE COURT: You saw the pipe higher than the uprights which were standing up when you came upon the scene?

THE WITNESS: Yes, sir.

THE COURT: You are certain of that?

THE WITNESS: Definitely certain, sir.

THE COURT: Any questions?

MR. CICHANOWICZ: No, your Honor.

MR. DUFFY: No, your Honor.

MR. TESTA: No, your Honor.

MR. CICHANOWICZ: Not of this witness.

THE COURT: The witness is excused.

(Witness excused.)

THE COURT: Ladies and gentlemen, it is now 4:30 P.M. We are going to recess at this time. As I indicated before, it will not be necessary for you to come in tomorrow.

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the way we hope it will go. I would anticipate finishing the proof today, finishing the case tomorrow.

Thank you.

Mr. Wrenn.

MR. WRENN: May I call Captain White to the stand.

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J A M E S W H I T E, called as a witness on behalf of New Jersey Export Marine Carpenters, Inc., after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WRENN:

Q Captain, would you be good enough to tell the jury a little bit about your background in the maritime field.

A Started going to sea in 1940 as an ordinary seaman; got my original license in 1944; sailed as a second officer thereafter, with about 9 years as chief officer and about two and a half years as master; came ashore in '64 with the parent company, steamship company as director of deck operations and safety; was with them from '64 until 1970. Since that time I have been engaged as a marine surveyor and consultant.

Q Would you tell us generally what you would do as a director of deck operations of safety. Would you tell me what those duties entail.

A In that particular job I was the only deck man in a marine department of a company that was very engineer oriented, and it was my job to see that the masters got what they needed to operate and navigate the ship safely and present their side of any discussion to management, investigate casualties, and any mishaps, cargo mishandling, consult with the various claims departments, and machinery, cargo, personal injury and the legal department as their consultant in the matters pertaining to deck operation.

Q You would advise them as to safety and so forth; is that right?

A Yes, sir.

Q Have you been in court for the last few days and did you hear the testimony of Mr. Montella?

A Yes, sir, I did.

Q And the longshoremen that testified as witnesses on behalf of the plaintiff?

A I heard the testimony of two longshoremen; yes, sir.

Q So that I won't have to repeat the testimony of Mr. Montella, did you hear all of it? Were you present

during the entire time that he testified?

A Yes, sir, I was.

Q Do you have an opinion with a reasonable degree of certainty as to whether or not the cradle or bed that was built by him was proper in all fashions with regard to the loading of pipe?

MR. TESTA: If your Honor please, I don't think there's any foundation laid as yet for the offering of such an opinion.

THE COURT: I am afraid I couldn't hear you, Mr. Testa. The sirens have made it a little difficult. Wait one moment.

(Pause.)

MR. TESTA: I say I don't think there's any foundation laid as yet for this man to offer an opinion.

THE COURT: Is it that you would like further information elicited on his background or is it the form of the question that you object to?

MR. TESTA: The form of the question.

THE COURT: I see. All right.

I think since it does to a certain extent summarize certain things it's objectionable as to form. Therefore, inasmuch as there is no objection to the qualifications of the witness, and he will be allowed to express an opinion,

I ask you, Mr. Wrenn, if you will rephrase the question.

Q Captain, do you have an opinion with a reasonable degree of certainty with regard to the propriety of the construction of the cradle which was used to hold the pipes?

A As was described --

Q If you would, just yes or no at this time.

Do you have an opinion?

A Yes.

Q What is your opinion?

A From what I heard, it was more than adequate for the purpose it was intended.

Q I want you to assume that one of the longshoremen testified that it is the job of the hatch boss to inspect the area where the men are going to work prior to commencing their operations.

Do you agree with that?

MR. TESTA: Objection, if your Honor pleases.

THE COURT: Sustained.

Q Can you tell us based upon your experience what a hatch boss should do, if anything, with regard to a work area prior to men commencing operations in that area?

MR. TESTA: Objection, if your Honor please.

THE COURT: I ask you to state the grounds for this objection.

MR. TESTA: I am objecting to Captain White testifying as to what the duties of a hatch boss are, and specifically with respect to what the duties of a hatch boss would have been on November 5, 1970 with respect to this type of a situation.

THE COURT: I would sustain the objection.

I would ask you, Mr. Wrenn, to lay a better foundation for the ultimate question.

Q Captain, are you familiar with the duties and obligations of a hatch boss as of November 5, 1970 when performing functions as described by the various witnesses that you heard?

A Yes, sir.

Q Would you tell us what the duties of the hatch boss were under those circumstances prior to his gang commencing operations?

MR. TESTA: Objection, your Honor. This is something that is covered and would properly be the subject of your Honor's charge.

I don't think it's proper for this witness to testify.

THE COURT: I think since he has experience on the waterfront -- he says he knows what hatch boss' duties usually are, and I will charge relative to expert opinions --

that the jury may give them whatever weight they see fit, greater, moderate or no weight at all, and I would consider this to be of an advisory nature and for the jury to accept or reject as they see fit.

Therefore, I will permit the question with the idea in mind that is up to the jury to give it whatever weight it deems appropriate.

Q Would you want the question read back, Captain?

A Please.

THE COURT: Certainly.

(Question read.)

A Yes, sir. His duties would be to know what the gang was going to do for that day, whether they were loading or discharging, and assign the men either in the hatch or on deck, gangway tender, and the hatch foreman, as any supervisor is the first line safety director. It would be up to him to look at the area in which the men were going to work, make sure that no hatches existed, that all was in order before he permitted them into the area and to start working.

Q Captain, assume that the ship hired New Jersey Carpenters to build this bed or cradle, and after it was completed do you have an opinion with a reasonable degree of certainty as to the duties, if any, of the ship with regard to that cradle?

MR. CICHANOWICZ: Objection.

THE COURT: Sustained.

Q Are you familiar with the duties and obligations of ships officers as of November of 1970 with regard to the good maritime practice after completion of a crib of the type we have heard described?

MR. CICHANOWICZ: Objection.

THE COURT: Sustained.

Q Do you have an opinion with a reasonable degree of certainty as to good maritime practice with regard to the obligations of a ship, ships officers, prior to the commencement of operations aboard that ship by stevedores?

MR. CICHANOWICZ: Objection.

THE COURT: Sustained.

Q Were you present when the deposition of Mr. Piper was read in court?

A Yes, sir.

Q Do you have an opinion as to whether or not the actions of Mr. Piper conformed with good maritime practice as of November 5, 1970?

MR. CICHANOWICZ: Objection.

THE COURT: Sustained.

MR. WRENN: May I know the grounds, your Honor?

THE COURT: Perhaps I might inquire of the

witness, if I may, for one or two questions.

Captain White, you indi ate that you have spent a considerable amount of time in maritime activities. Are you familiar with the manner in which cradles --

MR. WRENN: One of the jurors tells me he cannot hear, your Honor.

THE COURT: Captain White, you have testified that you have spent a number of years in the maritime industry.

Are you familiar with the manner in which cradles and cribs are constructed, which are constructed to receive cargo to be transported by ship?

THE WITNESS: Yes, your Honor, I am.

THE COURT: In normal maritime practice could you tell us the way that the ship owner goes about seeking to it that cradles are installed aboard his vessel?

THE WITNESS: The ship owner would through his pier representative employ such a carpenter organization as Mr. Montella worked for and tell him what he needed. They would supply competent men. A pipe crib like this is more or less a standard thing, pretty much all built the same. The only variance that you might find is where a more economical pier superintendent might want the uprights staged further apart, sometimes as far apart as eight feet. As a rule, six. That's why I considered this particular

crib with the uprights only five foot apart to be somewhat better than the average.

THE COURT: You say this particular crib had the uprights five feet apart?

THE WITNESS: Yes, sir, according to the testimony.

THE COURT: There were how many uprights installed?

THE WITNESS: That was never mentioned, sir.

THE COURT: Do you recall the length of the pipe that was to be placed on board the ship?

THE WITNESS: I heard 40 feet, sir.

THE COURT: I have a recollection that at least one witness testified that some of the pipe was of a shorter length.

Do you recall that testimony?

THE WITNESS: No, sir, I didn't hear that.

THE COURT: Am I correct that the practice is for this carpenter to actually install the crib or cradle?

THE WITNESS: Yes, the carpenter would review it and it would be subject to approval by finally the vessel's officers who have to sail with it, who have the ultimate responsibility for the safety of the ship.

THE COURT: In other words, are you saying that

the ship owner orders the crib to be built, the carpenter builds the crib and then the crib is finally inspected by the vessel's officers?

THE WITNESS: Ultimately.

THE COURT: That is the practice?

THE WITNESS: Yes. They must accept or reject the crib as it is prepared for them.

THE COURT: Is there a standard method of testing these cribs or a procedure which is followed relative to inspecting them?

THE WITNESS: No, sir, just a visual inspection, properly braced and the whalers are properly set.

MR. TESTA: I can't hear the witness, your Honor.

THE COURT: Will you please read the last answer.

(Answer read.)

THE COURT: Do you know of a practice which would include the touching of the uprights, the pushing and pulling of them by any person after they are installed by the carpenters?

THE WITNESS: Yes, I have done that, shaken the uprights, make sure that enough nails had been used, they were properly nailed together.

THE COURT: If they were wobbly in the first instance, when they were shaken I assume there's some practice that is followed?

THE WITNESS: They would be corrected, yes, sir, and have the carpenter repair it, bring it up to what you require.

THE COURT: If they were not to wobble or shake, they would appear to be in place, what practice would normally be followed?

THE WITNESS: That would be the end of the inspection. Ordinarily if the ship's officer looked at it and was satisfied with it, he may never mention it to anyone.

If he found some deficiency, he would bring it to somebody's attention or should bring it to somebody's attention.

THE COURT: Are you familiar with what happened on November 4 or thereabouts of 1970, when this cradle was installed on the SS Mosqueiro?

THE WITNESS: Only what I have heard in this courtroom, sir.

THE COURT: You don't know anything of your own knowledge as to what was done or not done?

THE WITNESS: No, sir.

THE COURT: All right.

BY MR. WRENN:

Q Captain, I want you to assume that the plaintiff, Joaquin Conceicao, on November 5, 1970 was employed by ITO as a stevedore aboard the S.S. Mosqueiro and he was working in a gang which was engaged in loading pipe aboard the ship and putting it into the cradle, and the pipes were coming in two at a time, they were about 30 feet long, 18 inches in diameter and each one weighed approximately 1800 pounds and they were in the process of putting the last two pipes into the crib and the plaintiff in order to unhook the winch -- and the hooks were stuck in the end of the pipe -- stepped onto the second or third pipe and he put his foot in that hole between the two pipes and leaned over, he had his left foot in the hole, he leaned over, his right foot was in the air and the pipes shifted causing injury to the plaintiff, do you have an opinion with a reasonable degree of certainty as to whether or not that particular practice by the plaintiff at that time under those circumstances conformed to good maritime practice?

MR. TESTA: Objection.

MR. DUFFY: Objection, your Honor.

THE COURT: Sustained.

Q Is it good maritime practice, Captain, for longshoremen to put their toes in between the pipes that are

secured by a wooden cradle while leaning over attempting to unhook the pipes?

MR. DUFFY: Objection.

MR. TESTA: Objection.

THE COURT: Sustained.

Q Assuming the facts I gave you, do you have an opinion as to whether or not that conforms with good maritime practice?

MR. TESTA: Objection.

MR. DUFFY: Same objection, your Honor.

THE COURT: Sustained.

Q Are you familiar with the proper fashion of loading pipes of this type into wooden cradles of this type?

A Yes, sir.

Q Would you tell us what good maritime practice would be under these circumstances?

MR. TESTA: Objection, your Honor.

THE COURT: If he knows the practice which is followed in the normal course of maritime business, I would like him to describe the practice that is normally followed.

Of course, you will have an opportunity later to inquire. Let him describe the practice, if he knows it, the practice which it normally followed.

You indicated you do know the practice that is

normally followed.

You indicated you do know the practice that is normally followed.

THE WITNESS: Yes, sir.

THE COURT: Will you describe the normal practice as you know it, please.

MR. TESTA: I assume,your Honor, we are only talking about the loading of --

THE COURT: That is correct at the moment, yes. That is the only thing we are talking about.

Would you just describe the normal practice as it is carried out in loading pipe aboard a vessel.

THE WITNESS: Yes, sir. I assume you mean so far as just landing the pipe, actually landing it in the crib.

THE COURT: In the normal course, how is it done?

THE WITNESS: It would be guided into place with the men following all safety, good safety practices --

MR. TESTA: Objection, if your Honor please.

THE COURT: That is a conclusion.

I would assume, for example, if the pipe is being lifted from a lighter or a dock, as it's swung over the deck of the vessel the men would not be supposed to stand

under the pipe; is that right?

THE WITNESS: That is right, sir. The tag lines might be helpful to guide it across. With pipe as long as this, 40 foot, avoid hitting booms, ships equipment that might be in the way and use these tag lines to guide it down to where they can reach it safely, guide it into place where it would nest. These pipes would nest in between the pipes that already landed there.

THE COURT: Under good practice, where would the longshoremen be standing as the pipes came down onto the deck within their reach?

THE WITNESS: A good practice would be to be standing on deck where the footing would be more firm and use the end of the pipe to guide them into place.

THE COURT: You may proceed, Mr. Wrenn.

BY MR. WRENN:

Q In your opinion, Captain, would it be bad maritime practice to be climbing on the pipes while the pipes were being put into place?

MR. DUFFY: Objection.

MR. TESTA: Objection.

THE COURT: Sustained.

Q Are there any additional safety precautions that may have been used under the circumstances by the plaintiff?

MR. TESTA: Objection, your Honor.

THE COURT: Sustained.

Q Is there any particular type of clothing that is recommended to be used while engaged in this kind of activity.

MR. DUFFY: Objection, your Honor.

THE COURT: I will sustain that objection to the form of that question. You can inquire relative to clothing, but I will sustain the objection as to form.

Q Captain, do you have an opinion with a reasonable degree of certainty as to what good maritime practice would require with regard to clothing under the circumstances that we have assumed the plaintiff to be working under?

MR. DUFFY: Objection, your Honor.

THE COURT: Yes, sustained.

Q Should the plaintiff have been wearing any special type of clothing?

MR. DUFFY: Objection, your Honor.

THE COURT: Yes, sustained.

Q Are there safety rules promulgated which are applicable to people doing the plaintiff's activities?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Are you familiar with the safety practices with

regard to clothing of longshoremen engaged in the plaintiff's activities on November 5, 1970?

MR. TESTA: Objection.

MR. DUFFY: Objection, your Honor.

THE COURT: Sustained.

Q In your testimony you mentioned that a good safety practice would be the use of tag lines in an operation of this type.

Are there any other safety practices that should have been used under the circumstances?

MR. TESTA: Objection, if your Honor please.

THE COURT: Sustained as to form.

I will permit you to inquire in this area, but not in that form.

Q Do you have an opinion as to what other practices should have been used, if any, good maritime practice would require under the circumstances?

MR. TESTA: Objection.

MR. DUFFY: Objection.

THE COURT: Yes, sustained.

Q Should the plaintiff have been wearing a special type of shoe?

MR. DUFFY: Objection, your Honor.

MR. TESTA: Objection.

THE COURT: Sustained. I will sustain the objection again.

Q Captain White, I want you to assume that pipe was being loaded in the fashion and under the circumstances that I have asked you to assume and under the circumstances that the various witnesses that you have heard testify to.

In your opinion, once the pipe became landed, would the fault of one of the uprights cause it to shift or move?

MR. TESTA: Objection to that, your Honor.

THE COURT: I have difficulty understanding the question. Let me ask the witness.

Do you understand that question?

THE WITNESS: I think so, sir.

THE COURT: If you can frame the question again. I think I know what you are getting at. I have difficulty, although the witness thinks he does understand the question. If you can frame it again, I will listen to it, if there is no objection. I will certainly permit an inquiry in this area.

Q I want you to assume all the circumstances that we have been discussing and I want you to assume that one of the uprights for whatever reason cracked or broke.

What would, in your opinion, with a reasonable

degree of certainty, happen to the pipes, if anything, under those circumstances?

A I don't see that it would affect the pipes.

Q Why not?

A Because of the length of the pipe. It's hard to conceive that the breaking of one stanchion, the manner of which hasn't been determined -- I don't see that this would have any great affect on the -- any affect at all on the mass of pipe in the crib.

Q Why not? What would prevent the pipe from moving?

A The pipes, as the testimony set forth, were very carefully landed in the recess provided by the pipes below. This would allow the top pipe to settle into this recess for a distance of approximately two and a quarter inches. This would affectly block the pipe the same as if you put a block of wood under a wheel. It would not permit it to move unless it was lifted out or moved with someforce. It would have to do this along the entire length of the pipe and not just at one stanchion.

Q How much force would be required in your opinion, to move that?

MR. TESTA: I object to that, if your Honor please. I don't know how the Captain can speculate on that.

THE COURT: Do you want to rephrase the question?

MR. WRENN: Let me put another question.

Q In your opinion, would the weight of a five foot two, 175 pound man cause that to move or drift?

A I would say no, sir.

Q Let me ask you this: Would the weight of 3600 pounds of steel pipe cause that to move or shift?

MR. DUFFY: Objection, your Honor.

THE COURT: State the grounds, Mr. Duffy.

MR. DUFFY: I think you are getting involved here in a rather complex matter of physics where the man is not testifying to the basis of detailed physical factors.

THE COURT: I would agree with you.

Doesn't this really go to the weight the jury should give this testimony? I would think that they are entitled to listen to this testimony.

I will not indicate to them how much weight they should give it. I recognize if you were to sit down with an engineer, with a slide rule, and figure out co-efficience of friction and force, you might come up with certain more definitive answers, but I think it is a matter of weight.

I will permit the question to be asked and I will indicate to the jury that you all have your every day

experiences in life. You know pretty much that when you put something down and you put something else on top of it, something else perhaps on top of that, what happens. Don't abandon your every day experiences. Listen to this witness, and see what he has to say, and I suggest that you give it whatever weight, great, little or none, that you deem appropriate.

I will overrule the objection with that view in mind.

MR. TESTA: If your Honor please, I would like to join in the objection on the grounds that this witness is not qualified to answer that question on the basis of his background and education.

THE COURT: Again it goes to weight in my view.

I have indicated to the jury, and I will indicate further in my charge, and I will do it now, that they should take the witnesses, the expert witness' background, his education, into consideration when they decide how much weight to give his testimony.

With that view in mind, I will overrule the objection.

You may answer the question. If you don't have it in mind, I will have our court reporter read it to you.

THE WITNESS: I think I recall it, sir.

Admittedly I don't know very much about physics,

but I do know the pipe is stated to weigh 1800 pounds, it is recessed, it is set in the recess and, therefore, would require considerable force, probably in excess of 1800 pounds to dislodge that pipe from that recess.

MR. TESTA: If your Honor please, I don't think that answer is responsive to the question.

THE COURT: I don't think it is either.

MR. WRENN: Maybe if we had the question read back.

THE COURT: All right.

MR. WRENN: Listen to the question, Captain.

THE COURT: We will strike the answer now. The jury will disregard the last answer.

We are going to have the court reporter read back the last question to Captain White, and he will try to answer it again.

(Question read.)

THE COURT: In your opinion.

THE WITNESS: In my opinion, it would.

Q I think you previously said that it would move if it were lifted also.

Didn't you give that answer previously?

MR. DUFFY: I object, your Honor.

THE COURT: Yes. I will sustain that objection

as to form.

Just restate your question.

Q Under what circumstances did you say the pipe would move or shift?

MR. DUFFY: I object to that, your Honor.

MR. WRENN: Your Honor, he already testified to it. I just want to bring it out --

THE COURT: The evidence as you heard it indicates that the pipe we are talking about here shifted immediately prior to the plaintiff's being injured.

THE WITNESS: Yes.

THE COURT: Could you tell us with a reasonable degree of certainty your opinion as to the cause of the pipes shifting?

THE WITNESS: As I said before, it would have to be lifted out of that recess or struck with a great force. There is no indication here that it was struck with any great force.

I am inclined to believe that it was lifted out of the recess and moved in this manner.

Q What is the basis of that opinion, Captain?

A It's merely that the pipe could not move without being lifted. If it was not struck by a force, it had to be lifted.

Q I want you to assume, Captain, that only the forward end of the pipe moved, that a witness testified that the aft end didn't move at all.

What is the significance of that factor?

A I really can't -- I just can't see a rigid piece of pipe moving at one end and not the other.

Q In other words, would the fact that the aft end did not move further confirm your opinion that it was lifted?

MR. TESTA: I object to that.

THE COURT: Sustained.

MR. WRENN: I just have one more point, your Honor.

THE COURT: Certainly.

Q After hearing all of the evidence, assuming all of the facts, would you have any recommendations of any safety practices that should have been used on this particular morning?

MR. DUFFY: Objection.

MR. TESTA: Objection.

THE COURT: Sustained.

Q Do you have an opinion with a reasonable degree of certainty as to what safety practices should have been used on that morning?

MR. DUFFY: Objection.

MR. TESTA: Objection.

THE COURT: Sustained.

Q Are there rules and recommendations promulgated which apply to the dress of longshoremen engaged in activities of this type?

MR. TESTA: Objection.

MR. DUFFY: Objection, your Honor.

THE COURT: Sustained.

Q Are there customs and practices with regard to the dress of longshoremen engaged in activities of this type?

MR. DUFFY: Objection, your Honor.

MR. TESTA: Objection.

THE COURT: Would you state the grounds, gentlemen, so the record is clear on this.

MR. DUFFY: I object on the ground it is leading, your Honor.

THE COURT: All right. I will sustain it on that ground.

Perhaps you could rephrase your question.

Q I will just go back to the same thing.

Are there any practices that you are familiar with having to do with dress, clothes to be worn by longshoremen doing the work the plaintiff was doing?

MR. DUFFY: Objection, your Honor.

THE COURT: Sustained.

Q Is there a practice with regard to the dress of longshoremen engaged in the activities the plaintiff was engaged in?

MR. TESTA: Objection to the question.

THE COURT: Let's just find out if there was any custom or practice on November 5, 1970 regarding the dress which longshoremen were supposed to have, clothing they were supposed to wear aboard ship.

Was there a custom and practice as to dress in November of 1970?

THE WITNESS: I can't state with certainty as to that date, your Honor. I know that there were various recommendations and campaigns done safetywise in the Port of New York at that time. I know that these recommendations go back as far as when I first became engaged in safety in 1964.

MR. DUFFY: If your Honor please, I think the witness has answered the question.

THE COURT: Yes, he has. I will strike the last part of your answer as not responsive.

You may proceed if you wish.

Q Were there such regulations in effect on or before that time?

MR. DUFFY: Objection.

MR. TESTA: Objection. The witness has said he cannot state that.

THE COURT: He did say something about practice. I will permit the question to be asked.

If it can be answered with a yes or no, we will see where it leads.

MR. WRENN: Can I just try and clarify it?

Q This question doesn't have to deal with any particular rule promulgated as of November of 1970. It may have been promulgated prior to that.

Is there any rule or custom which was promulgated about that time or prior thereto which would be applicable to the plaintiff?

MR. DUFFY: If your Honor please, I object. I think the witness is bound by the prior answer.

THE COURT: I am not sure he is. I think the question is objectionable for another reason.

I will sustain the objection.

Q Was there a custom and practice in effect on or about November of 1970 having to do with the dress of plaintiffs of this type engaged in operations aboard ship?

MR. TESTA: Objection.

MR. DUFFY: Objection.

THE COURT: Yes. I think one of the grounds, gentlemen, is that the witness has already been asked essentially the same question.

MR. TESTA: He has already answered that question in the negative, your Honor.

THE COURT: That is the court's understanding as well, Mr. Wrenn.

MR. WRENN: I am under the impression he misunderstood, your Honor.

May I just have an answer again?

THE COURT: All right.

MR. WRENN: If he knows.

THE COURT: I thought he answered the question. If he wants to change his answer, he can.

Q Do you understand my question, Captain?

A Yes, sir. You asked if there were practices or regulations in effect at that time.

Q Right.

A I replied that I was not certain as of November 1970 --

Q In other words, they may have been after that?

MR. TESTA: Objection, your Honor.

THE COURT: I think the answer is the same as given before.

If you want to ask another question beyond the one you just asked, you may do so.

Q Were they promulgated before that date?

THE COURT: If you know.

A No, it was after that date.

Q After?

A That I'm more familiar with. I'm not familiar with -- I can't recall whether -- what regulations were in effect, if any, in November.

Q Thank you, Captain.

CROSS-EXAMINATION

BY MR. DUFFY:

Q Captain White, did you hear the testimony of the plaintiff or hatch boss, Ratliff, on Monday?

A I heard the hatch boss, Ratliff's testimony.

Q You didn't hear the plaintiff?

A No, sir.

Q In listening to any of the testimony that you heard, did you --

THE COURT: Mr. Duffy, I think you may be between one or two of the jurors and the witness. I think it was inadvertent.

Perhaps if you could move to the lectern. Also it would assure that your voice is loud enough so the jurors

can hear you.

Q Captain, in any of the testimony that you heard in the courtroom here, did you hear that the A pipe or any of the pipes were lifted at the time of the accident?

A No, sir.

MR. DUFFY: I have no additional questions.

THE COURT: Thank you, Mr. Duffy.

CROSS-EXAMINATION

BY MR. CICHANOWICZ:

Q Captain White, as I recall your testimony, you expressed the opinion based upon the description of how this pipe bed was constructed that it was safe and proper for the carriage of pipe; is that correct?

A Yes, sir.

Q The job of constructing cribs is work that is done by who normally, independent marine carpenters?

A Here in this port and at various other US ports, yes, sir.

Q Those are the people who do that work; is that correct?

A Yes, sir.

Q There are a number of marine carpentry firms in New York City; is that right?

A Yes, sir.

Q They are expect in the construction of cribs; is that correct?

MR. WRENN: I object,your Honor.

THE COURT: Yes, sustained.

Q These marine contracting firms, their work is to what, construct cribs and other wooden structure for the carriage of cargo; is that correct?

A That's right.

Q That is the business they are in?

A Yes, sir.

Q And the work of doing that on board a ship, of course, is then performed by the marine contractor and by persons employed by him; is that true?

A Yes, sir.

Q The marine contractor is the person who obtains the carpenters to do this work; is that correct?

A The marine contracting, you say, sir?

Q Yes.

A No, sir. I would say that ordinarily this is the owner's representative --

Q Who hires the marine carpenters to do the construction work?

A The would be the owner's representative, the

vessel's representative. If they delegate this to a terminal operator, the terminal operator on behalf of the owner.

Q Are you familiar with New Jersey Export?

A No, sir.

(Pause.)

MR. CICHANOWICZ: Mr. Wrenn concedes that the employees or the marine carpenters who constructed this bed were employees of New Jersey Export.

Q As I do repeat, your opinion is that this crib was properly constructed for the carriage of pipe; is that correct?

A Yes, sir.

Q Thank you.

THE COURT: Thank you, Mr. Cichanowicz.

CROSS-EXAMINATION

BY MR. TESTA:

Q Captain White, when you were here the other day you heard Mr. Montella describe the manner in which this pipe bed was put together, didn't you?

A Yes, sir.

Q What did you hear him say as tohow they put it together?

A He described laying the deck stringers on ships. These, if I recall correctly, are standard 4 by 6's. The

two 4 by 6's of the deck stringer are on each side of the ship, inboard and outboard, to form the walls of it. Another 4 by 6 filler piece is placed between these thereby giving you actually three 4 by 6 pieces in every upright. There's a whaler placed along the bottom, which is then secured with kickers against --

Q Captain, I am asking you what you heard him say, not the way it's usually done.

MR. WRENN: I object to that, your Honor. The witness is answering and he interrupts him in the middle of an answer.

THE COURT: Let him finish. If you want to respond after that, Mr. Testa, you may.

A If I'm describing something he didn't, I am relying strictly on memory.

THE COURT: You remember he said something about whalers and cross pieces and so on?

THE WITNESS: Yes.

THE COURT: You have indicated that.

What else?

THE WITNESS: Another whaler about halfway up, as I recall. He said with your braces against this whaler. Further, it was tied together with two inch lumber. I don't recall how much two inch lumber, but he did indicate that.

Q Did you hear him say how many uprights there were?

A No, sir, I did not.

Q Did you hear him say how many whalers there were?

A To my -- as I remember it, he described two on each side.

Q How many?

A Two on each side.

Q Did you hear him say how many braces there were?

A No, sir.

Q Did you hear him say what the braces were attached to?

A I can't say that I recall him saying that. He may have, he may not have. I can't recall.

Q All right.

So that your opinion then is based only upon what you heard Mr. Montella say in court yesterday; is that right?

A That and his deposition.

Q Were you given the opportunity of reading his deposition?

A Yes, sir.

Q When did you do that?

A Sometime ago.

Q How long ago?

A A matter of several months.

Q Did he say the same thing in his deposition that he said in court?

A Insofar as the crib, essentially yes.

Q Yes. The opinion that you gave was based upon what he said in his deposition and what he said here in open court yesterday; is that right?

A Yes, sir.

Q You did not know how many braces or supports he used or what they were connected to, did you, when you gave that opinion?

A I think --

Q Did you know that, Captain?

THE COURT: He started to answer.

I would ask that we not interject too quickly.

MR. TESTA: If your Honor pleases, this could be answered yes or no.

MR. WRENN: No matter how it can be answered, I think the witness is entitled to a courtesy of an answer before another question is propounded.

THE COURT: Unless counsel is indicating he wishes to wishdraw the prior question.

MR. TESTA: No, I would like an answer to that

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question.

THE COURT: Let's go back.

I will ask the court reporter to read the question just before the last one where I think the witness said something to the effect he thinks. Then I will permit you, Captain White, to answer that question, to the best of your ability.

A (Continuing) I think Mr. Montella indicated that each upright was braced. It is my impression that while he did not mention the number of uprights, that they were every five foot apart.

Q Did youknow how many braces were used?

A As I say, I think Mr. Montella indicated that each upright was braced.

Q Do you know how many braces were used? That is the question.

A No, sir.

Q Do you know what the braces were attached to when you gave your opinion?

A On the crib they are attached to the whaler.

Q Do you know whether they were attached to anything else?

A I have the impression, and I believe from Mr. Montella, that they were jamb fitted against the hatch

coaming or the fish plate at the rail.

Q Jam fitted, you say?

A Jam fitted on the --

Q Right up against the hatch coaming?

A Yes.

Q Is that the way a crib is usually constructed, Mr. White, with the braces right up against the hatch coaming?

A Yes, sir.

MR. WRENN: I object to this, your Honor. It's not built near a hatch coaming. It couldn't be braced up against it.

THE COURT: The witness answered the question. Let's proceed, gentlemen.

The witness answered, "Yes" to the question.

Q On the other side do they put the braces right up against the railing?

A Not against the railing, sir.

Q What supports the upright? That is what I am trying to find out from you, Captain.

A The upright is braced with a wooden brace that runs down on top of the spring piece, and where it's allowed it is against the hatch coaming. You don't just attach it to the deck stringer, you get a jam fit so that you have

the support of steel work to further reinforce your diagonal brace.

Q Did you hear any testimony to that effect, that this crib was constructed or supported in that manner? Did you hear anybody say that?

A It's my impression I did, sir.

Q Who said that?

A I can't recall.

Q You can't recall, all right.

And then you gave an opinion that the pipe was more than adequate based upon what Mr. Montella said and nothing further; is that correct?

A Yes.

Q In your answer that the pipe bed was more than adequate, it was adequate to hold the pipes, wasn't it?

A Yes.

Q It was adequate to hold a full load of pipes, wasn't it?

A A reasonable load; yes, sir.

Q When you build a pipe bed, it is intended that it will be loaded completely with pipes, isn't it?

A Yes, sir.

Q You don't build a pipe bed that is five feet high with the intention of only filling it half way, do you?

A No, sir.

Q So it is intended when the pipe bed is built that the pipes will be loaded right up to the top; is that right?

MR. WRENN: I object to that. We don't know what it is intended for. If you don't have enough pipes to put it all the way, you might put it halfway.

MR. DUFFY: I object to counsel's --

THE COURT: There is an objection. I will sustain the objection and permit an inquiry in this area.

Q It's usual and customary to load a pipe bed, isn't it, fully and completely with pipes, Mr. White?

A Yes, sir.

Q That's its intended purpose, to hold pipes, so there's nothing unusual about putting pipes in and filling it up completely with pipes, is there?

A No, sir.

Q You said before that the hatch boss' duty was to look at the area and be sure that everything was all right.

If you looked at the area and saw that everything was all right, nothing wrong, there would be nothing wrong with him having his men work there, would there?

A No, sir.

Q And the inspection or the looking, as you said, is a visual inspection, isn't that right, Captain?

A Yes, sir.

Q That means the hatch boss would just go up and look at it with his two eyes. If it looked all right, that is all he had to do?

A Yes, sir.

Q That would be the complete extent of any inspection that the hatch boss would have to make of that pipe bed; isn't that right?

A I would say that whatever inspection was required to satisfy him that it was safe for his men to work there is what is required.

Q You said that was the visual inspection, did you not, sir?

A At one time I did say that; yes, sir.

Q That's right. You also said that would be the extent of the inspection, didn't you?

A I believe we went into that a little further later on with the shaking of the uprights.

Q All right.

If he looked at it and the thing seemed to be firm and secure -- that's only what he would have to do -- he would be justified in having hismen work there?

A If he satisfied himself that it was safe for his men to work there, yes.

Q You said the tag lines might be helpful to guide the pipe down into the pipe bed. Didn't you say that, Captain?

A No, sir. I believe I said the tag lines might be helpful to clear the other booms and the gear at the hatches as it comes across the ship, and as it gets close to where you are going to land it, it might be preferable to hand haul it and put it in.

Q You used the word, "might," didn't you, Captain?

A Yes, sir.

Q If the same thing can be done by the men using their hands to guide the pipes into place, that would be perfectly proper, wouldn't it?

MR. WRENN: I object to that, your Honor. The witness said they should use their hands to guide it into place.

THE COURT: Let's get right to the point here. There is an objection. It is sustained.

You can rephrase your question if you would, Mr. Testa.

Q Captain, isn't it customary for the men to guide these pipes into the pipe bed just by taking their hands as the pipe comes down and guiding it into place? Isn't that the way it's done?

A As it's landed, yes, sir.

Q Did you hear the witnesses in this case say that that's what they did?

A Yes, sir.

Q This pipe would be lowered, it's on wires with hooks in the end. Did you hear that?

A Yes, sir.

Q And it is lowered down, and as it comes down they just guide it into place with their hands, right?

A Yes, sir.

Q That's the way it's done, isn't it, Captain?

A Usually; yes, sir.

Q Right. I believe you also said that the cracking of one upright would not have any affect at all on the pipes in the crib; is that right?

A That's right.

Q And the pipes would remain in place because they are supported by their own pipes that are underneath them; isn't that right?

A And by the balance of the uprights every five feet apart.

Q By the remainder of the uprights; is that it?

A Yes, sir.

Q And you said that the testimony that you heard

indicated that the pipes were very carefully landed in the space between the pipes?

A Yes, sir.

Q And that this would effectively hold the pipes in place? That's the way it's done, isn't it, Captain?

A Yes, sir.

Q If you are loading pipes into a pipe bed and you bring down two more pipes and put them on top of the other pipes, this is not going to cause the pipes to roll or shift; isn't that so? They are going to rest right on top of the other pipes?

A Yes, sir.

Q Right. It's not going to cause the other pipes to move or shift, is it?

A Providing they are snugged up, there's no room for them -- we are talking -- we'll say the boom tier.

Q Yes.

A I mean -- apparently I have to not leave anything out. As you are working the boom tier, you would have to work them out so they are against your uprights so that there's no rolling, and if there was slack space in that boom tier, you would probably have to chock pipes so you could land your next tier without pipes rolling all over the place.

Q Captain, did you hear the witnesses describe how the pipes were loaded into that pipe bed?

A Only the last draft, to my memory.

Q You didn't hear any testimony indicating that there were any spaces between the pipes and the lower tiers, did you?

A No, sir.

Q It's only that the pipes were loaded in there close together, snug, nestled together, and the last two pipes put on the top, that would not cause the pipes to move or shift, would it?

A No, sir.

Q You also said there was no indication of the pipe being struck by any great force; isn't that right?

MR. WRENN: I object to that. I object to, "indication."

THE COURT: Sustained as to form.

MR. TESTA: I am merely asking the captain if that is what he said.

THE COURT: Did you say that?

THE WITNESS: No.

THE COURT: He said he didn't.

Q Was I mistaken when I wrote that down? You said there was no indication --

THE COURT: Sustained.

Q On the basis of that statement you said you thought the pipe was lifted, wasn't it, Captain?

MR. WRENN: I object to that. He misstates the statement. He said: On the basis of my misstatement, isn't that what you said.

THE COURT: Sustained.

Q Captain, what was the basis of your statement when you said you thought the pipe was lifted?

A Because there was no testimony here, and that is where it comes in. I heard no testimony here to indicate that the pipe was struck. There were no further weights handled.

Q That is what I just said. So I did not misstate or --

THE COURT: Sustained.

Q Is that the basis of your statement, Captain?

A Yes, sir.

Q You also said you didn't hear any testimony about any pipes being lifted; isn't that right?

A That's right.

MR. TESTA: No further questions.

THE COURT: Mr. Wrenn.

MR. WRENN: No questions.

THE COURT: Thank you very much, Captain White. You are excused.

(Witness excused.)

THE COURT: I think this would be a good time for us to take our mid-morning recess. I see the next witness is here.

We will take ten minutes now. We will resume at 25 of 12, and we will go to our one o'clock luncheon recess.

Please, ladies and gentlemen, do not discuss the case among yourselves in the jury room and continue to keep an open mind. We will proceed with the next witness in ten minutes.

(Recess.)

(In open court; jury present.)

THE COURT: Gentlemen, just one comment which I wish to make.

As you all know, this is a loud courtroom and we have a tendency, all of us, to drop our voices. I noted during the earlier session that some of the jurors were straining to hear. So please as an accommodation to all concerned, and I am speaking now of counsel and the witnesses, try to keep your voices up.

At this point we will resume.

Mr. Wrenn.

* * *

MR. DUFFY: I have no additional questions, your Honor.

THE COURT: Thank you, Mr. Duffy.

MR. TESTA: No questions, your Honor.

MR. CICHANOWICZ: No questions, your Honor.

THE COURT: Thank you very much, Dr. Lodico.

(Witness excused.)

THE COURT: Mr. Wrenn.

MR. WRENN: Your Honor, I have no further witnesses.

I would just like to read some portions of depositions that have previously been read.

THE COURT: You may. Any deposition which has been read in part previously may be read in further part by any counsel.

You may do that at this time.

MR. WRENN: Thank you, sir.

MR. TESTA: What deposition?

MR. WRENN: Mr. Piper.

THE COURT: You will, of course, note the page and line of your reading.

MR. WRENN: Page 21, your Honor, line 11: I am reading from the deposition of Mr. Piperwho testified on behalf of New Jersey Export Marine Carpenters, Inc., and

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CIA De Nav. Mar. Netumar that's the defendant and third-party plaintiff.

"Q What did you observe when you went to the vessel with regard to this accident?

"A I observed many men around the pipe bed and previously loaded pipe and that's all. I couldn't get close enough to see what was actually there.

"Q Where were you when you saw this?

"A I originally saw it as I was walking down the pier towards the vessel.

"Q Then you went up on the vessel?

"A I went on board, yes.

"Q What did you observe with respect to the pipe cargo and pipe bed at the number one hatch?

"A I observed there were a lot of men around the fore part of the bedding, and that's about all I could tell from the distance I was away.

"Q Which pipe bed was involved, if you recall?

"A I believe it was the starboard pipe bed.

"Q Was that the inshore bed at that time?

"A Yes, sir.

"Q Now, you say you saw men around the forward end of that pipe bed. Where were you when you saw that?

"A Originally, as I was walking down the dock, and

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then as I approached number one hatch.

"Q Did you see the injured man at that time when you were up on deck?

"A I couldn't distinguish which one was the injured man.

"Q Did you observe the pipe cargo at that time?

"A Yes. It was in my line of sight.

"Q Can you describe the condition of the pipe cargo at that time?

"A The fore part of it appeared to be resting over against the side of the vessel, and the first upright appeared to be bent or laying over, not in its full upright position as the others were.

"Q Would that be one of the uprights on the railing side of the pipe bed, the outboard side?

"A As far as I recollect, yes.

"Q So far as we understand, the accident involved the starboard inshore pipe bed as number one hatch?

"A Forward also.

"Q The forward end?

"A Forward end, yes, sir.

"Q Restricting ourselves to that inshore pipe bed at number one hatch, when you went upon deck, about how high was the construction of the pipe bed?

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"A I would estimate it at about five feet.

"Q How much cargo was in there when you saw it?

"A I believe it was about 80 percent loaded.

"Q When you say '80 percent loaded', what was the approximate height of the pipe cargo with respect to the height of the uprights of the bed.

"A About four feet.

"Q Did you also have an opportunity to observe the offshore pipe bed at that time?

"A I didn't specifically look at the offshore pipe bed, but in my moving around the vessel I probably observed it, but I don't recollect any condition.

"Q After you got there and you saw the men and the forward end of the pipe spread out and what appeared to be to the first upright forward bent, what did you do next?

"A I waited until the injured man was removed from the vessel, and then proceeded to find out from the stevedore superintendent the condition of the man.

"Q What did you find out from the stevedore superintendent"?

MR. DUFFY: If your Honor please, I have an objection to this question and answer.

THE COURT: The next one, you mean?

MR. DUFFY: Line five, if your Honor please.

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THE COURT: Line 5.

MR. DUFFY: And the answer on line 7,your Honor.

THE COURT: I see. All right. One moment now.

(Pause.)

THE COURT: Sustained.

MR. WRENN: Going down to line 10:

"Q What, if anything, did you do next concerning the pipe cargo or the upright?

"A After the injured man had been removed from the vessel I contacted Mr. Montella and requested his opinion as to what happened, and also could it be repaired, and can the pipe go forward in its present condition or do we have to unload the whole bed to reconstruct.

"Q Did you have a conversation with him?

"A Yes.

"Q What did he tell you at that time?

"A If I recall, he told me that the pipe bed did not break, in that it could be repaired in place by moving a few pieces, without any risk of damage or loss of cargo in transit to its final destination.

"Q Did he make repairs to the pipe bed?

"A Yes, sir, I believe he did.

"Q Do you know what kind of repairs he made to the pipe bed?

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"A No, sir, not specifically.

"Q Did Mr. Montella" --

MR. TESTA: Objection, if your Honor please, to the next question.

THE COURT: All right. Wait a minute now.

MR. DUFFY: It's line 6.

THE COURT: All right, I am looking at it.

(Pause.)

THE COURT: Yes. In view of Mr. Montella's testimony, I will sustain the objection to the next question and answer. That is the question beginning on line 6 and the answer ending on line 10.

MR. WRENN: May I be heard on that point, your Honor?

THE COURT: You may. Step to the side bar.

(At the side bar.)

MR. WRENN: Your Honor, the reason I am trying to read that, I just want to indicate that the testimony of Mr. Montella was not of recent origin. He had a conversation with Mr. Piper immediately after it. He gave his opinion at this time. Mr. Piper was not here so we could ask him that question. Therefore, it's the basis of my wanting to read that portion of the deposition.

MR. TESTA: If your Honor pleases, this is

obvious hearsay. He was here in court. He testified he didn't see such a thing happen. This is hearsay, your Honor.

Now, to get this in by way of indirection by saying something he couldn't have said --

THE COURT: That's right. You are not bolstering up something he said. He did testify he didn't see it. This obviously doesn't, it seems to me, do anything more than permit you to read in a matter which would be hearsay.

MR. WRENN: Except that everybody is trying to say my man is an expert; Mr. Piper relied upon him as an expert, and he asked his opinion, and he gave his opinion at that time.

THE COURT: Mr. Montella was here. He testified as to his opinion. The jury had a chance to see him. I don't think that this question and the answer, which I will read into the record now so it is out of the presence of the jury --

MR. TESTA: Can we do this in chambers?

THE COURT: I will do it very low. In fact, I will let the report copy the question beginning at page 6 and the answer ending at page 10 so there is no problem.

"Q Did Mr. Montella tell you, at that time, what happened to the pipe bed to cause that upright to bend

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over?

"A I don't recall exactly. Something tells me he said that the longshoreman had hit it while loading other pieces, making it weaker, causing it to weaken."

The objection which was interposed by Mr. Duffy and Mr. Testa is sustained.

MR. WRENN: I respectfully except, sir.

(In open court.)

MR. WRENN: Going down to line 11:

"Q Did you inspect the pipe at the forward end after the accident?

"A I think I did look at it, but I don't recall specifically the condition.

"Q Did you inspect the pipe bed after the repairs were made and the loading was concluded?

"A I observed it. I don't think I thoroughly inspected it.

"Q After the pipe was loaded to the pipe bed, it was lashed down, correct?

"A Yes.

"Q This was before the vessel sailed?

"A Yes.

"Q Was anything else done to the pipe bed and cargo besides the loading of the pipe and the lashing down of the

pipe cargo?

"A Are you specifically referring to after --

"Q After.

"A You're including the repairs?

"Q That's right.

"A No, sir, there was nothing else done, to my knowledge.

"Q Was any further construction done by the carpenters over the top of the stow of pipes?

"A I don't recall specifically. There's a possibility of a catwalk being constructed on the top, but I'm not positive.

"Q When this stowage of pipe cargo at number one hatch was completed, how high did the pipe cargo fill up the pipe beds?

"A I believe it came within a few inches of the top.

"Q Did any of the pipe cargo at the number one hatch extend above the height of the pipe bed?

"A Not to my recollection."

Page 27, going down to line 11:

"Q Can you give us as much detail as possible as to exactly what you saw with respect to that upright at the forward end by the ships rail?"

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MR. DUFFY: If your Honor pleases, I think for continuity we should start with line 8.

THE COURT: If you want it, you could read it yourself. I will ask you to read it, Mr. Wrenn.

MR. WRENN: Read what, sir?

THE COURT: I will read it, the question on line 8:

"Q You, yourself, did not examine the upright that was bent over?

"A I don't recall."

That is what Mr. Duffy asked.

Now, proceed.

MR. WRENN: Line 11:

"Q Can you give us as much detail as possible as to exactly what you saw with respect to that upright at the forward end by the ship's rail?

"A I believe it was leaning over towards and resting against the bulwark on the starboard side forward, just leaning over towards it. That's all I can recall.

"Q Could you determine or did you determine whether that particular upright was broken, cracked or just leaning over?

"A No, I couldn't determine.

"Q How about the rest of the outboard side of the

pipe bed fence?

"A I recall they were all in the position as originally constructed.

"Q So from what you saw it was only this one that was out of place?

"A Yes."

Page 30, line 6:

"Q Did you learn at that time what specifically had happened to the injured man in the accident?

"A You mean as far as extent of injury?

"Q No. What the mechanics of the accident were, what pipe was involved with his body.

"A No, sir.

"Q You just knew that a man was hurt up by the pipe?

"A Yes.

"Q Prior to this incident, can you recall any difficulties" --

MR. TESTA: Mr. Wrenn, please. I make an objection to this question and the following answer, your Honor.

THE COURT: All right. Let me read it.

(Pause.)

THE COURT: Sustained.

MR. TESTA: And also to the following question and answer.

THE COURT: I am not sure if Mr. Wrenn wishes to read the following question in view of my ruling.

MR. WRENN: I would make an offer to read it, your Honor.

THE COURT: Same ruling.

MR. WRENN: The next one I wanted to read:

"Q Did you ever have any trouble with these pipe beds on prior occasions, just while being loaded themselves?

"A No, sir.

"Q When you came up on deck, were any of the ship's officers or ship's crew around?

"A I don't recall exactly who, but I believe the captain and the chief officer were present when I arrived.

"Q Did you discuss the accident with them?

"A I only recommended to them that -- and also to the stevedore superintendent, that he give the name of the injured party to the master, and then the master said he would enter it into his log book.

"Q Were you able to determine whether any of the ship's crew had been present at the time of the accident?

"A No, sir.

"Q Do you know who was present at the number one

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hatch when the accident occurred?

"A Not specifically, no, other than the men were engaged in the work at that position.

"Q Do you know if any of the carpenters were up at number one hatch around the time the accident happened?

"A I don't recall."

I want to go to page 34, line 6.

MR. TESTA: If your Honor please, I object to this question and answer.

THE COURT: Sustained.

MR. WRENN: Your Honor, may I be heard on all three of those objections at this time?

THE COURT: You may.

(At the side bar.)

MR. WRENN: Your Honor, the testimony in the case is that the stevedores on the day prior to the accident were loading by use of a winch into hatch number one. They also testified that the carpenters were working, building the crib on November 4. All I am trying to establish here, as this gentleman indicated, in order to expedite the sailing he had them loading and building the crib at the same time, and on occasion the loading backed into the uprights and so forth. He is setting up a situation because he is trying to expedite it.

MR. TESTA: If your Honor pleases, obviously again the attempt is being made to inject evidence into this case by indirection which could not be testified to by the witnesses because there is no testimony in the case that any such thing ever happened. This is pure speculation.

The testimony by four of plaintiff's witnesses is no such thing happened on this occasion.

MR. WRENN: On the fifth. They didn't say it happened on the fourth. The court is allowing the jury to draw inferences from the plaintiff's testimony. I am asking the court to allow me to put in proof so the jury can draw whatever inferences they want from the procedures set up and permitted by the ship.

MR. TESTA: This is entirely improper, your Honor.

THE COURT: Objection sustained.

(In open court.)

MR. WRENN: I am finished with that deposition. I just want to read one question and one answer from the deposition of the plaintiff.

MR. DUFFY: Page, please?

MR. WRENN: I am looking. May I just have a moment, sir?

THE COURT: Yes.

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(Pause.)

MR. WRENN: This is the deposition of the plaintiff taken on January 9, 1973 and going to page 71, line 15.

MR. DUFFY: Just a moment, please.

(Pause.)

THE COURT: Do you have it, gentlemen?

MR. TESTA: Yes.

MR. WRENN: Page 71, line 15:

"Q From November 5, 1970 you did not drive a car until when?

"A Until December sometime.

"Q December what?

"MR. CICHANOWICZ: That is December 1970?

"THE WITNESS: Yes."

That is all.

Thank you, sir. I rest.

THE COURT: Mr. Cichanowicz.

MR. CICHANOWICZ: May I read just a couple of questions and answers of Mr. Piper? All of his testimony has been read. I don't see any reason for producing him.

THE COURT: Let's have no comments on that subject.

MR. CICHANOWICZ: I'm sorry, sir.

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THE COURT: You may read from his testimony. The jury will disregard the last comment by Mr. Cichanowicz.

MR. CICHANOWICZ: I'm sorry.

THE COURT: That is all right.

You may proceed.

MR. CICHANOWICZ: Page 33, line 14:

"Q Did the repairs that were necessary to the pipe bed cause an additional billing to Netumar from New Jersey Export?

"A No, sir, I don't believe so.

"Q Do you know whether or not --

"A Excuse me. Do you mean additional billing in the sense of carpentry work to repair them?

"Q Yes.

"A No, sir. As far as I know, no.

"Q Did the repairs cause New Jersey Export carpenters to put in more time on the vessel?

"A No, sir. As far as I know, no additional time."

Then line 20 on page 34:

"Q Could you tell us when this pipe that was loaded at number one hatch arrived at the pier?

"A Part of this pipe around on the 26th of October and part of it on the 29th.

"Q Did any pipe cargo arrive on the 5th?

"A No, sir.

"Q All the cargo that was loaded on the Mosqueiro on this voyage had arrived prior to the 5th of November, is that correct?

"A Not all of the cargo.

"Q I mean all of the pipe cargo?

"A Yes.

"Q Now, these daily labor records which have been marked as plaintiff's exhibits 2A to 2F" --

THE COURT: It's actually now 5A through F, as I understand it.

MR. CICHANOWICZ: I'm sorry. It is 5, yes.

"Q -- are these all of the charges which New Jersey Export made for the work performed on the Mosqueiro on this occasion?

"A Yes, sir.

"Q This material which appears on the daily labor record of New Jersey Export under date of November 2, 1970, by whom was that ordered?

"A Mr. Montella after consulting with myself.

"Q Did you tell him or indicate to him what type of lumber he should use?

"A No, sir.

"Q Was this new lumber or old lumber?

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"A To my recollection, it was new or we wouldn't pay for it if it wasn't.

"Q Were you charged for new lumber?

"A Yes, sir.

"Q This date of November 2, 1970, which is on plaintiff's exhibit 3, does that indicate the date on which this lumber was delivered to the pier?

"A Yes, sir."

THE COURT: Thank you, Mr. Cichanowicz.

MR. CICHANOWICZ: I rest, your Honor.

THE COURT: Thank you.

Mr. Testa.

MR. TESTA: If your Honor please, I believe there are motions to be made at this time, which I would like to make. I believe other counsel would also.

THE COURT: All right.

You may step to the side bar and make themotions at this time. I think they can be made here.

MR. TESTA: Might I suggest that they be made in chambers or in the absence of the jury, your Honor?

THE COURT: Let me suggest this: I think it might be more convenient to the jurors if I sent you to lunch early at this time and ask you, if you would, to return at ten minutes to two. It is now twenty minutes of one. We

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will take care of our matters. That should give counsel an hour for lunch themselves and give you a little more than that so that you can get started.

Please do not discuss the case among yourselves nor remain within the hearing of anyone discussing the case. Please continue to keep an open mind.

We will resume with the jury at ten minutes to two. Thank you very much.

(Jury absent.)

THE COURT: Let the record reflect that the jury has left the courtroom.

Gentlemen, you may proceed.

MR. DUFFY: If your Honor please, at this time on behalf of the plaintiff, my first motion is for a directed verdict against both defendants, New Jersey Export Marine Carpenters, Inc. and CIA. De Nav. Mar. Netumar on the cause of action in warranty or strict liability against New Jersey Export, and the cause of action for unseaworthiness against the vessel. I make both motions on the ground the testimony is uncontradicted and reasonable men could not differ on a finding that this crib in normal use failed resulting in approximately the injuries that the plaintiff sustained.

THE COURT: The motion is denied.

MR. DUFFY: If your Honor please, I also make

motions against both defendants that the evidence supports only one conclusion, that they were both or either of them were negligent in bringing about these injuries to the plaintiff.

THE COURT: And, as a matter of law, there is no contributory negligence?

MR. DUFFY: That is my third motion. I said two.

THE COURT: I thought you were joining that with this one.

MR. DUFFY: I also make motion on all counts that in a defense of contributory negligence be stricken as a matter of law.

THE COURT: The last two motions that you made are denied.

MR. WRENN: Your Honor, at this time may I read in those questions or am I out of order? I am referring to the three questions that you sustained objections to.

THE COURT: You may.

MR. WRENN: In the absence of the jury, going to the deposition of Mr. Piper, page 30, line 15:

"Q Prior to this incident, can you recall any difficulties with those pipe beds that you had put on other ships earlier?

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"A I recall on earlier and even later vessels that -- because these must have been constructed while other cargo was being loaded, that some of them had been knocked over by drafts going over the side of the ship, and the longshoremen loading inside the hatch.

"Q In other words, as they crossed the deck and go into the hatch?

"A Yes, sir."

Going to page 34, line 6:

"Q When you spoke about the trouble prior and afterwards with respect to these beds, what did you mean?

"A I meant that in prior beds constructed on other vessels we were operating, in order for the fastest loading, you know, expediting the vessel's operation, these beds had to be constructed while other work was being performed on the vessel, that in so constructing them while other work was going on, I do recall instances, not exactly or specifically which ones, but there were where the pipe bed or one of the uprights was hit and knocked over.

"Q Hit by what?

"A Draft cargo being loaded on the ship."

Thank you, sir.

THE COURT: You may proceed with your motions.

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MR. WRENN: Your Honor, I renew the motions made at the end of the plaintiff's case and on the whole case I move for a directed verdict with regard to the cause of action for negligence. I think after all the proof is in, there is no proof of any negligence, either in the design or in the actual building of the bed.

Then I would like to make a separate motion addressed to the breach of warranty.

THE COURT: Relative to your first motion on negligence, the motion is denied.

MR. WRENN: Respectfully except.

With regard to the breach of warranty workmenlike quality, I submit that any warranty I owed, I owed to the ship, and I didn't owe any -- there is no proof of any breach of warranty on my part, and even if there were, I owed no duty to this plaintiff.

THE COURT: I think that just as you would owe a duty to the ship and owe a duty to the member of the ship's crew, you would owe a duty to this plaintiff as well. It would be reasonably foreseeable that a person would come aboard to do the ship's business, the business that could otherwise be done by the ship's crew, and under the circumstances I would suggest that I differ with you. I believe there is a duty owed here, and under the circumstances I

deny your motion.

MR. WRENN: I move on the further ground that the sole proof of negligence in the case is the plaintiff's negligence, and I say that this was caused one hundred percent because of the plaintiff's negligence, and I ask the court for a directed verdict on that ground.

THE COURT: I think there's enough for the jury to infer from the proof that your client was at fault, and under the circumstances, since there is enough, I think the case should go to the jury on that issue.

Therefore, your motion is denied.

MR. WRENN: I respectfully except, sir.

THE COURT: Anything else, Mr. Wrenn?

MR. WRENN: No, sir.

THE COURT: Mr. Cichanowicz.

MR. CICHANOWICZ: May it please the court, the defendant Netumar renews the motions made at the end of the plaintiff's case and also moves for a directed verdict.

I believe at this point, your Honor, there is no evidence with respect to any negligence on the part of the defendant. Frankly, based on the testimony in this case, there is no indication that what the defendant did or failed to do in any way was unreasonable conduct under the definition of negligence.

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THE COURT: I think the case is weaker against your client, Mr. Cichanowicz. I think in view of some of the material that I have heard presented in the record, specifically some of the material read into the record from the deposition of Mr. Piper, your man, there would be enough to present the matter to the jury.

Therefore, on your motion relative to dismissing or for a failure to show negligence, that motion is denied. You have your exception.

MR. CICHANOWICZ: I submit that the evidence in this case does not support any finding that the vessel was not fit for its intended purpose.

THE COURT: I think there the plaintiff has made out a stronger case. Here we had an appertinence to the ship, a pipe bed, which had been constructed, and at the time something occurred which caused the pipe to spill out of the bed and injured the plaintiff. The bed, as I recall the most recent testimony, was some 80 percent full.

Under the circumstances I think the jury could infer that the bed had been constructed in a way that it couldn't hold even 80 percent full, and under the circumstances, that these appertinences, to wit, the uprights, were not fit and the bed itself was not fit for its intended use and, therefore, the vessel was unseaworthy.

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Motion denied. You have your exception.

MR. TESTA: If your Honor pleases, at this time on behalf of the third-party defendant, International Terminal Operating Company, Inc., I join in the motions made by Mr. Wrenn and Mr. Cichanowicz, and I further move to dismiss the third-party complaints, the respective third-party complaints brought by both defendants here, and for a directed verdict in favor of International Terminal Operating Company, Inc. on the grounds that there is a complete failure of proof that the third-party defendant in any way breached its contract or performed its stevedoring services in this case. There is a complete failure or proof to the effect that the third-party defendant in any way failed to perform the stevedoring services in a workmanlike manner.

In fact, the proof is to the contrary. Four witnesses in this case, the plaintiff, Mr. Conceicao, the hatch boss, Mr. Ratliff, Mr. Head and Mr. Brooks all testified that at no time did any draft being brought aboard, consisting of two pipes, from the lighter and placed into the pipe bed by the stevedores -- at no time did any such draft strike any of the uprights. These witnesses all testified that these pipes were laid in that pipe bed very gently.

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The testimony of all the witnesses in this case, the four plaintiff's witnesses and Mr. Piper, was to the effect that these pipes did not extend above the top of the five foot uprights. Mr. Piper said 80 percent loaded, four feet high. The other witnesses all said that the top most pipes were lower than the five foot uprights.

There is absolutely no testimony in this case which would in any manner, shape or form indicate that the stevedore failed to perform the stevedoring services in a workmanlike manner. The only testimony in this case was an opinion which Mr. Montella offered, and he admitted it, based upon no facts in this case.

I asked him, and he said that there was no factual basis for his opinion, but he was permitted to give an opinion, nevertheless, that a draft had struck the upright. By his own admission, there was no factual basis for that opinion. There is absolutely no factual testimony in this case, although Mr. Montella said that the pipes were higher than the uprights. There is no testimony in this case that this was unsafe, improper, dangerous or unworkmanlike or in any way contributed to the happening of the plaintiff's accident.

There was testimony here with respect to tag lines, but there was no testimony by anybody, including

Captain White, that it was necessary to use tag lines under the circumstances in this case. He said they might have been used, but he didn't say it was necessary or required.

I submit to your Honor there's been a total failure of proof on both third-party complaints. There's been no proof at all that the stevedore breached its contract or did not perform the stevedoring services in a workmanlike manner.

I move to dismiss both third-party complaints and move for a directed verdict in favor of International Terminal Operating Company.

THE COURT: There is evidence in the record that the practice is for the hatch boss to inspect the pipe bed visually and perhaps by touching portions of it, including the upright, prior to the loading of pipe.

In this case the record reflected that the hatch boss, Mr. Ratliff, was not present until some 20 or so minutes after the loading had begun. That is the first order of business.

Secondly, Captain White this morning testified that good practice would have the stevedores standing on the deck when the pipe was being loaded. The evidence is that they were not standing on the deck, but were standing on the hatch cover and, not only that, but that they were

standing on the hatch cover beside the pipes and not at the end of the pipes. Therefore, if the pipes did, as they in fact did, roll, which is the only direction they could be expected to move, they would roll in and toward and possibly over as in this case the employees. If the employees, including Mr. Conceicao,had been standing at the ends of the pipe and could take the hooks out from the ends of the pipe, it would seem to me that this accident might not have happened.

Finally, we do have, whether it is credible or not is for the jury, the testimony of Mr. Montella that the pipes were loaded above the level of the uprights, which the court would find to also be a failure of the workmanlike performance required of the stevedore. I say that may not be credible. That is a matter for the jury.

For these various reasons the court denies the motion. You have your exception.

Gentlemen, we will recess now until ten minutes of two.

(Luncheon recess was taken until 1:50 p. m.)

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(AFTERNOON SESSION - 1:50 P.M.)

(In open court; jury present.)

THE COURT: Good afternoon, ladies and gentlemen.

We will now proceed with the testimony in the case which, as I have indicated, I would hope to finish in the afternoon, and perhaps you will get an earlier than anticipated start for home.

I think at the conclusion of the testimony it would be a good time for us to break, since we have certain legal matters to attend to, and then we would get to the closing arguments first thing tomorrow morning.

Mr. Testa.

MR. TESTA: If your Honor pleases, I indicated to you I expected Dr. Tagliambe at 2 o'clock. However, I do have Captain Wheeler here. I don't want to keep anybody waiting.

THE COURT: I think the doctor could wait 15 minutes and we will take an appropriate break. We will certainly try to accommodate him.

MR. TESTA: Thank you.

Captain Wheeler.

C A P T A I N W I L L I A M W H E E L E R, called as a witness on behalf of the third-party defendant, after having been first duly sworn, was examined and

testified as follows:

DIRECT EXAMINATION

BY MR. TESTA:

Q What is your occupation, sir?

A I'm presently self-employed here in New York as a marine surveyor and a marine consultant.

Q And how long have you been in that business?

A Since 1955.

Q What is the nature of your business as a marine consultant?

A To assist in operational problems as they arise with steamship companies, stevedoring companies, shippers and consignees of cargo.

Q What did you do before that?

A Prior to '55 I was aboard America Flag Ship as master for a period of six months. Prior to that sixmonth period I worked as a stevedoring superintendent here in New York back until 1952 when I first came ashore from a job as deck officer aboard America Flag Vessels. From 1948 back to '45 I served as master aboard America Flag Vessels. In '50, '51 I served in the navy during Korea.

I have spent all of World War II aboard merchant flag vessels in various capacities as desk officer. Prior to that I served as cadet in the cadet training program, now

known as the Merchant Marine Academy. Prior to that I served as ordinary seaman aboard ship and prior to that I graduated from high school, 1935.

Q Captain Wheeler, you have heard the testimony in this case from the beginning; have you not?

A Yes, sir.

Q You have heard Mr. Conceicao's testimony?

A Not all of it. I heard the latter part of it.

Q Did you hear the testimony of the hatch boss, James Ratliff?

A Yes, sir.

Q And the other two witnesses, James Head and William Brooks?

A Yes, sir, I did.

Q I believe you also heard Mr. Montella's testimony?

A Yes.

Q You were here today when Captain White testified?

A Yes, sir, I was.

Q Did you hear Captain White give an opinion with respect to the pipe bed in which these pipes were put and were resting at the time of the plaintiff's accident?

A Yes, sir, I did.

Q On the basis of Mr. Montella's testimony as to

how this pipe bed was constructed, what materials went into it, the manner it was put together, could you give an opinion as to whether that pipe bed was adequate or inadequate for the purpose it was intended?

A No, sir, I could not give an opinion either way.

Q Will you explain to the court and jury the reasons you could not give an opinion?

A In the material used, the four by six dimensional lumber -- the other material used was adequate to construct -- if you had a sufficient amount of it, to construct a good pipe bed, but there would be -- I would need more detailed information as to the principles of construction, how the pieces were fastened.

You must remember that none of this wood can be nailed to the deck of the ship. The ship is steel. It all has to be wedged in securely just to hold the frame itself. So lacking that type of information, I wouldn't know -- I could not conclude whether it was adequate or inadequate.

Q You also heard Captain White testify with respect to what he said were the hatch boss' duties.

Did you hear him say that?

A Yes, sir.

Q Did you hear him say that the hatch boss had the duty to make a v_sual inspection of the pipe bed?

A I did hear that, yes.

Q Is there anything else that the hatch boss should do other than look at the pipe bed, in your opinion?

A Well, the hatch boss is like all of us. We do as we are told by our superiors.

If the ship foreman or the pier superintendent or one of his superiors instructed him to load pipe into that pipe bed, I would then conclude that if I was the hatch boss, I would go ahead and load the pipe into the pipe bed because I was so instructed to do so by my superior.

Q Based upon your years experience, Captain, and the testimony that you heard in this case, did anybody else have a duty to inspect that pipe bed?

A Yes. During its construction the carpentry company that built it, their supervisor should keep a constant check on the construction of it. After it's done and turned over to the ship who ordered it to be done, the ship's people, representative, the chief officer or someone should see that it has been done properly because he's going to go to sea with it. Then, as I indicated, the ship foreman would look at it, too.

Q Would looking at it be the extent of the inspection that would be required?

A If it survived -- from the stevedore's viewpoint?

Q Anybody.

A Anyone that is going to use it, that didn't build it -- if it survived the visual inspection, a close visual inspection and you could see nothing wrong with it, you would accept it as an adequate pipe bed to be loaded. If there was something visually defective with it, you would then investigate a little further and reinforce it as needed or have it reinforced as needed.

Q Did you hear Captain White testify to the effect that tag lines might be helpful in the situation such as involved in this case? Do you have an opinion, Captain?

A Yes.

Q Do you have an opinion, Captain, as to whether or not tag lines might or might not be helpful and necessary under the facts and circumstances in this case?

A Under the -- what I heard relative to this case, tag lines were not needed because manual control of the draft was not needed continuously.

Q Would you explain to the court and jury your reasons for that statement?

A Yes, sir. The pipes for the two pieces of pipe, as they are being lifted from the lighter alongside the ship, would come up in a position parallel with the ship's rail. As they are lifted clear of the rail and they

start to come over the deck, the gangway man just puts his hand on one end of it and turns the pipe around, if I may use two pencils.

The pipe is coming up parallel to the ship's rail. The gangway man pushes the pipe, one end of the pipe around, the pipe is then rotated 90 degrees, comes across the hatch, the men standing on the hatch touch the end of it that reaches that, orients it the way they want it, either forward or aft, the pipe then is proceeded to be landed right on top of the other pipe that is in the crib, in the pipe bed.

Q In your opinion, is there any need of lines of any kind to be used in connection with the operation as you heard it described in this case by the witnesses?

A No, sir, as I heard it described. I seen it that way on other occasions.

Q The manual guidance, having the men put their hands on these pipes and change direction and guide the pipes into the pipe bed, is that the usual and customary way it's done?

A Yes, it is.

Q Is there anything unsafe or improper or unworkmanlike about that?

A No, as long as the men stay out from under the

actual plain of the falls and they don't stand under the pipe as it's coming across. It's perfectly safe, perfectly proper procedure.

Q Captain Wheeler, did you hear Captain White say that the cracking of one upright would not have any affect at all on the pipes in the crib?

A I heard him say that, yes.

Q Did you agree with that, sir?

A Not wholly, no, because it might, it might not.

Q Would you state your reasons for that opinion.

A Because the -- if as the pipe bed, the uprights were being constructed one of them was just slightly out of alignment, an inch or two too close to where the pipe was going to be stowed, then that upright would bear most of the weight of the pipe that is being stowed. Most of the lateral forces generated by the pipe being stowed in the bed, and when that exceeded a certain degree of force, that would be displaced and then the other ones in line would tend to absorb or support their intended load which up until that moment they might not have been supporting. So in that sense it wouldn't cause any disturbance in the pipe.

If there was an upright that was disturbed, it was disturbed through the forces that -- in spite of the forces that it was intended to support, and that would

indicate that there was something wrong with the erection of that upright.

Q Captain, you heard the witnesses in this case testify with respect to the manner in which these pipes were put in the pipe bed?

A Yes, sir, I did.

Q Was that done in the usual and customary manner?

A What I heard was normal, that the pipe was landed by the winches on top of the pipe below it.

Q Is it customary to load pipe up to the top of the uprights in a pipe bed, Captain?

A Yes.

Q Is there anything unusual or unsafe or improper about that or unworkmanlike, the loading of pipes in --

A No. As long as the lateral support that is required is, in fact, supported by the uprights, it's all right to load it that way.

Q Is there anything unusual or improper or unworkmanlike in loading pipes a little bit above the top of the upright?

A In the center of the stow occasionally sometimes they will go above the level of the upright, but that particular pipe that is above it will not be touching the upright. It will be depending for its stability on the two

pipes below it.

Q Would it be possible, Captain, in your opinion to load pipes alongside the upright and above the upright?

A It's impossible to do it.

Q Would you explain the reason for that.

A Because there's nothing providing the needed lateral or sideway support, and you just couldn't rest it there long enough to take the hooks off of it. It couldn't be done.

Q It could not be done right alongside the upright?

A That's right.

Q It could be done in the middle of the stow?

A Yes, where it has two pipes to rest on.

Q What is the reason for that, that it can be done in the middle of the stow?

A Because the two pipes -- it's resting on two pipes. Each of those two pipes provide the lateral support needed by the pipe above because the pipe above is resting in the valley and it's chocked in there by its own weight.

Q Captain, if you had this crib, and you heard the testimony with respect to the height to which this crib was loaded -- did you hear the various witnesses testify that the crib was not loaded up to the top of the upright? Did you hear that?

A Yes, I did.

Q Did you hear them say it was loaded below the height of the upright?

A Yes.

Q Captain, in your opinion, if this crib was loaded and then brought a draft with two pipes and put it in the middle, would that have any effect on the other pipes?

A It would just increase the weight on top of the other pipes and it would increase the -- the pipe, if I may digress a minute, as I said before -- one pipe is resting on the bottom, on the top of the other two pipes below it. In so resting sort of a wedge force is developed and the weight of that pipe is pushing those two pipes apart. In the sense you would have the higher up you go, the more increased lateral force you have pushing out sideways, against the uprights.

Q Would those last two pipes cause any of the other pipes to move or shift, in your opinion, Captain?

A No, I don't think they would because the racks should be or the pipe beds should be constructed to contain a full load of pipes and the handling of a full load of pipes.

Q In your experience, Captain, in the 30 or more

years that you have been in this business, are pipe beds built and intended to hold a full load of pipes?

A Yes, they are intended to contain the pipe until it can be lashed. Once the lashings are on it, then the pipe rack is relieved of some of its strain, but it's used again at the port of destination to contain the pipes again where the lashings are taken off so the pipes could be discharged. It serves two functions.

Q Who does the lashing of the pipes after the pipe bed is loaded?

A Here in New York it's usually the same company that provides the carpentry service to the ship.

Q After those pipes are lashed, is it customary to put a catwalk over them, Captain?

A On one side or the other, yes, of the ship.

Q In your opinion, Captain, would a carpentry outfit lash pipes and put a catwalk over them if they thought the pipes were not stowed properly?

A I don't think they would.

MR. WRENN: I object to that, your Honor.

THE COURT: Yes, sustained.

The jury will disregard whatever answer the Captain started to give.

Q Did you hear the testimony in this case,

Captain, with respect to the position of Mr. Conceicao and the hatch boss on top of a hatch at the time these pipes were being loaded?

A Yes, sir, I did.

Q Do you have an opinion with respect to that, Captain?

A Yes. As I described the transit of the pipe from the barge, the usual transit from the barge up to the rail, turn it over the hatch, turn it, and down into position. You need some men up on top of the hatch to guide it. If necessary, if the pipe takes a sheer on you, starts to drift one way or the other, you need a man there. Usually he has a stick of dunnage or broomstick. He will touch the pipe to swing it back again.

Q Did you hear Mr. Conceicao's testimony with respect to the manner in which he unhooked the pipe?

A Yes.

Q Were you here at that time?

A Yes.

Q Did you hear him say he stepped on top of the pipes in order to take the hook out?

A Yes, I did.

Q Do you have an opinion with respect to that, Captain?

A Yes, sir.

Q What is that opinion?

A It's perfectly normal, proper. The pipe has been loaded, it's resting in the valley of the pipes below it, it's stable of its own weight and it's perfectly proper to walk on it and expect it to remain stable under a man's weight.

Q I believe you were also here when Mr. Montella gave an opinion; were you not?

A Yes, sir, I was.

Q Do you disagree or agree with the opinion that he gave as to the cause of damage to the uprights?

A I think if I recollect right, that he said the damage -- the broken upright was caused by having been struck by a pipe or a draft of pipe.

Q Do you disagree with that?

A I would disagree with that completely because I don't know just when that upright was broken. It might have been broken as a result of the pipe that was in the rack already laid there having shifted, first the upright having been displaced and then the pipe in shifting coming down on the upright and broke the upright. The broken upright might have been a result of the displacement of the upright by the lateral forces that were at work in the bed,

the pipe bed itself.

Q Would the weight --

A To me it wouldn't be -- the fact that the upright broke or snapped would not have any significance at all to my analysis of this situation.

Q Would the weight of a man cause the pipes to move in any way?

A No. This is 1800 pound pipe. At that time you had roughly 20 ton of pipe in that crib. It's not going to move under a man's weight.

Q Were you here when Mr. Ratliff testified, the hatch boss?

A I was.

Q Did you hear him say that he looked at the pipe bed and he didn't see anything wrong with it?

A Yes.

Q If he did, he wouldn't let his men work there.

A I heard him say that.

Q Do you agree with that, sir?

A Yes.

Q Is that proper and customary procedure for a hatch boss to follow?

A Yes. The hatch boss does -- continually does inspect, if you want to use that word -- look out for the

safety of his men at all times.

MR. TESTA: Thank you.

CROSS-EXAMINATION

BY MR. WRENN:

Q When was the last time you went to sea, Captain?

A 1955.

Q Since that time have you spent almost every day of your life in court?

MR. TESTA: Objection, if your Honor please.

THE COURT: Yes, I will sustain an objection to form.

You can inquire on the subject.

Q This is November of '73.

How many days have you spent in court this year?

A This year?

Q Yes.

A I can't recall. I keep no records of this type. If I had to guess, I would guess about 35 to 40 days in court.

Q Aren't you in court every time the firm of Alexander, Ash, Schwartz and Cohen tries a case?

A No, not at all. I work for many other law firms. I believe I worked for your law firm a few times,

too.

Q I believe you are wrong.

A Are you with Mr. Larkin?

Q Yes, sir.

A I have worked with Mr. Larkin.

Q Not to our knowledge.

A That is your knowledge.

Q How long ago did you work for Mr. Larkin?

A He was defending the Waterbury Rope against --

Q How long ago was it?

A It must have been at least two years ago.

Q As far as this case, haven't you been here every day listening to the testimony?

A I was here.

Q Isn't that what you do in all the cases?

A No. That's what Mr. Testa requested me to do in this case. That's what I did.

Q Isn't that what most attorneys ask you to do?

A No. Some of them exclude me out of the court. They don't want me to hear the testimony. It all depends on the attorney.

Q On every occasion you always sat in the back during the entire trial?

A That's what you saw.

Q Isn't 100 percent of your income from testifying --

A No, sir.

Q -- and making reports for pending litigation?

A No, not 100 percent.

Q What percentage?

A The major part. Recently the last three or four years has been regarding -- with regard to this litigation.

Q Over 90 percent?

A No, I would say 75 percent. Again I am guessing.

Q Excuse me?

A Again I'm guessing at that.

Q At one point you told us that the hatch boss didn't have any duty to look prior to his men commencing operations; is that true?

A I meant to convey that it's not only the hatch boss that has the duty to see that the men are working in a safe area.

Q In other words, the hatch boss does have a duty to look in an area before his men commence operations, right?

A If this -- if his ship foreman or the pier superintendent or his supervisor did not already do so, yes. If he knows that they didn't already do so, yes, he

would be obligated. A moral obligation to look out for his men, of course.

Q Let's not get involved with morals. Let's talk about good maritime practice.

A It's consistent.

Q Isn't it good maritime practice for a hatch boss to inspect an area before his men go to work?

A In every case?

Q In every case.

A No, it's not. It's not needed in every case.

Q How about in this case?

A I don't know in this case.

Q You weren't there?

A I wasn't there, of course.

Q Mr. Montella was there and he looked at the wood and he saw the mark of the pipe on the split wood. Isn't he in a better position --

MR. TESTA: Just a moment. I object.

THE COURT: Let him finish his question, please, Mr. Testa.

Ask a proper question. Don't make a speech.

You may proceed, Mr. Wrenn.

Q Isn't he in a better position to render an opinion than you?

A Is he? If he's capable of a more accurate analysis or diagnosis, yes, he would be.

Q Doyou have any reason to believe he's not capable?

A From what I heard, I wasn't very much impressed on his ability as a carpenter.

Q Are you an expert carpenter also?

A I had -- I worked -- Mr. Montella's father worked under my supervision when I worked for McGrath Corporation.

Q Therefore --

A I can judge -- I consider myself a pretty good judge of carpentry activity aboard ship.

Q You never saw this work aboard the ship, did you?

A I didn't say that I wasn't impressed with the work aboard the ship. I wasn't impressed with his description of it.

Q You didn't see the actual work aboard the ship?

A Of course not.

Q Mr. Montella is the one that did it. He's a qualified carpenter, isn't he?

A You qualify him.

Q You knew his father and you know him.

A That doesn't mean because his father is qualified he's qualified.

Q Are you saying --

A I was not impressed with his description of how he built the pipe bed.

Q He didn't give a full description. You don't know how he built --

A How can any witness reach a conclusion or an opinion on scant insufficient information?

Q You can criticize it without having sufficient information?

A Of what he said. Of what he did, in fact, describe here in court, I can criticize, yes, because of my knowledge of the business.

Q He didn't tell you enough to render an opinion, but whatever he said you can criticize?

A What he said I can criticize and I can put my finger on a few things that were deficient or he did not describe.

Q And you were sitting in court.

Did you ask Mr. Testa to ask him questions so that you could render an intelligent opinion?

MR. TESTA: If your Honor pleases, I object to that. There is no such testimony in this case, that anybody

asked me to ask questions.

THE COURT: He is asking if questions were suggested to you by this witness. I am going to permit that.

Q From time to time during the trial haven't you discussed the case?

A From time to time I have discussed the case.

Q With Mr. Testa?

A In this particular instance, there wasn't time because you went on with the witness and the -- there wasn't time for me physically to talk to Mr. Testa about that point in Mr. Montella's testimony.

Q During the course of the trial haven't you consulted with Mr. Testa about the progress of the case?

A Of course.

Q Haven't you aided and helped him in developing certain factual situations?

A Only factual situations.

Q That is why you are here?

A Yes.

Q That is what you are being paid for?

A That's right.

Q With regard to this particular case, did the hatch boss have a duty to inspect the area before his men commenced operations? Is your testimony yes or no in this

case?

A I can't answer that yes or no. It has to be a qualified answer.

If he knew that the area was not -- had just been completed, had not been inspected by his superior, yes, by all means, he would look over the area visually. If he saw anything visually, that would prod him or encourage him to investigate further, he would do so.

Q It wouldn't be good practice to test the uprights to see they were sturdy?

A Test the uprights? This to me -- if those uprights didn't move when you shook them with no load in them, I would be very much surprised because they are only standing there braced in with lumber and nails, and in the fore and aft direction I would expect it to move, considerable movement. But in the thwart ship I would expect very little or no movement because they don't become rigid and solid until the weight of the pipe is in the bed.

Q Are you saying it would not be good practice to physically test the uprights prior to putting pipe in there?

A It's not significant. It doesn't -- I would expect it to move. The degree of movement -- if they come free under your hand or they fell over as you touched them, that would be a degree of movement sufficient to cause you

to do something about it.

Q Don't you think it would be a good idea to test them?

A Somebody did, I'm sure.

Q Wait. Did you hear any testimony in this case at all that anybody tested them?

A I don't understand what you mean by test.

Q You said somebody did test them.

A Somebody did shake them.

Q Who?

A The man that nailed it knew what he was doing when he nailed it there. His supervisor knew he was erecting an upright intended to support the lateral force developed by a weight of 20 something tons of pipe.

Q Is that testimony in this case to that effect that you heard?

A I didn't record all the testimony. I didn't make any attempt to memorize it. This is the ideas that were communicated to me sitting in the back of the courtroom.

Q Are you saying that somebody testified to that now?

A I can't recall whether they did.

Q You are giving an opinion based on what you

say testimony is and now you can't recall whether or not there was testimony to that effect?

A Just a means of communicating ideas. These are the ideas that I got sitting in this court listening to this testimony. I didn't make a record of it. I didn't even make any notes.

Q You just got ideas?

A Yes. Isn't that the purpose of the language?

Q I don't know what the purpose is.

Are you testifying as to facts you heard and then saying you don't recall giving an opinion and then saying you don't recall whether or not those facts --

MR. TESTA: Objection.

THE COURT: Sustained.

MR. TESTA: He is badgering the witness.

THE COURT: Please I have ruled. Sustained.

Q Is it your testimony that with regard to this particular case, with regard to the hatch boss, only a visual inspection was necessary and nothing more? Is that your testimony?

A My testimony is that a visual inspection is made before the men, the longshoremen are directed to work in that area, and if the visual inspection stands up, nothing else is needed. If it doesn't stand up, you have to investi-

gate further.

Q Suppose no visual inspection was made, is that bad practice?

A That would be, yes. Someone has to investigate, someone has to look to see that it's safe to put the pipe in there.

Q You said a tag line was not necessary; is that right?

A Under this condition.

Q Under this particular case?

A Right, not necessary.

Q And good practice would be for the men to stand near the pipe as it came over the rail and turn it the way they wanted to turn it?

A This is what is done. My testimony is this is good practice and this is what is done.

Q Didn't you hear the hatch boss say when it comes over they all stand back --

A Because the context of the previous questions was about standing under the pipe. You don't stand under the pipe. That's why the pipe is turned 90 degrees, so it comes over in a line parallel with --

Q What is a tag line?

A A tag line is an extension of the human hand.

If you can't put your hand on it, you tie a tag line on it and anticipating the need for this manual pressure. Now you can pull on the tag line. You can only pull on the tag line, you can't push on a line.

Q What is a dunnage board?

A A dunnage board is a piece of wood, usually nominally one inch thick, four to six inches wide.

Q Could you use a dunnage board as a tag line in this particular case and then you could push it?

A I said -- I think I said that the men usually do use a piece of dunnage or a broomstick in order to guide as needed, as it goes across the hatch, without standing under it. They use the broomstick because it's eight foot high.

Q They didn't use a dunnage board --

A I didn't hear anybody ask them whether they did or not.

Q If they didn't, that would also be poor practice, would it?

A Poor practice would consist of the lack of guidance, the lack of necessary guidance. If they can accomplish the necessary guidance without the dunnage, perfectly proper, or without tag lines, perfectly proper.

Q Absent guidance we have bad practice, right?

MR. TESTA: Objection, if your Honor please, to that. The captain has just said what his opinion was.

THE COURT: Yes, I heard it, too. Sustained.

Q Would it be bad practice to load the pipe over the uprights?

A Not necessarily, no.

Q Would it be good practice?

A Yes, it's good practice in some cases.

Q In this particular case would it be good practice?

A With anticipating the catwalk to be erected over the top of it, it wouldn't be good practice in this case only because --

Q Would or wouldn't?

A Would not.

Q Would not?

A Would not be done because you would require a more or less level surface on which to rest your catwalk so the ship's crew can walk forward and aft while the ship is at sea.

Q You could build an additional step up the side and then have a catwalk that was level; is that right?

A Anything is possible. Usually you try to take the most sensible way of doing it.

Q In this particular case would it be bad practice

to put the pipes in over them?

MR. TESTA: I object to that, your Honor.

THE COURT: Let me find out.

Overruled.

A The pipes I think on my -- when this subject was touched on, the pipes that are rested above the height of the upright -- the pipes that are rested above cannot be that pipe that would normally require the upright for lateral support. If it's over here, it can be safely placed on top of the two pipes below it, but it can't physically be done resting on one pipe and over here. The upright now is no longer extending in this area. You couldn't put the pipe there to start with.

Q Suppose that you can lean the pipe, a portion of the pipe against the upright, and the upright would hold it, right?

A Then the upright would be above --

Q Then the pipe would be above the upright?

A The top of the pipe might be above it, the bottom of the pipe would be below.

Q You can have a portion of the pipe above the upright leaning on the upright; isn't that right?

A I said the pipe as a cylindrical shape is supported by the fact that it's resting on two objects.

Ordinarily it's two other pipes. At the upright it's resting on one other pipe and it's leaning against the upright.

If there's no upright to lean against, the pipe isn't going to stay there, it's going to fall down. You can't even take the hooks off it. You couldn't put it there long enough to take the hooks off it.

Q Then you said that putting the last two pipes on top of the pile shouldn't cause a shift of the pipes under it; is that right?

A I don't understand that question. The last two pipes? You mean the two pipes involved in this incident?

Q You --

A Those were the last two pipes as far as that crib is concerned.

Q What was the testimony as to where those pipes were placed, if you recall?

A They were placed on top of other pipes and they were firmly at rest and, in fact, some of the hooks had already been taken off.

Q Were they near the upright or were they in the middle, or where were they?

A They were resting on two other pipes below them.

Q Were they near the upright or near the center --

A They were not dependent on the upright for their

support.

Q Were they closer to the inshore upright, the offshore upright or placed in the center?

A Somewhere between the two extremes. Whether it's dead center or not, I don't know. They were firmly supported --

Q Some testimony said they were near the upright and other testimony was they were in the center.

Which testimony did you accept?

A Does near mean up against?

MR. TESTA: Objection, if your Honor please. I don't think the captain has to accept testimony one way or the other.

THE COURT: No one is asking him to really.

I will sustain the objection, though, as to form and permit counsel to inquire.

Q You gave an opinion based on testimony. As I recall it, there were some variations in the testimony.

I am just trying to decide or find out which testimony you relied upon to give your opinion. One of the witnesses said that he put his toe in a hole and the pipe shifted.

A I didn't hear that.

MR. DUFFY: Objection, your Honor. Mr. Wrenn

has used that terminology before, and I don't recall that language in any of the testimony.

THE COURT: Do you recall that language?

THE WITNESS: I didn't hear it.

THE COURT: Let's proceed.

MR. WRENN: That's what the plaintiff testified to.

MR. DUFFY: I object to that.

THE COURT: The witness doesn't recall it.

Under the circumstances, you can ask your next question, if you would. You may proceed.

Q What movement of the pipe did you base your testimony on?

A When the lateral support of that pipe stowage was removed, that end of the pipe -- there was an end upright that was removed, that failed. That pipe then would spray out, whatever you want to call it. That end of the pipe that had been depending on that upright for support would tend to move toward the place in which that upright had been.

Q And the other end would not move at all?

A It would move, but it wouldn't move laterally. It might rotate.

Q There was testimony that the other end didn't

move at all.

A Incredible to me. It has to move. The nature of the movement might be different. It's not a lateral movement. It might be a twisting or an upward movement. If this end goes down, the other end goes up.

Q That portion of the testimony of the witness that said that the other end didn't move is incredible?

A To me, I said.

Q In your opinion?

A What he meant by that --

Q No, not what he meant, what he said.

A Right. To me it's incredible.

Q You are dealing in ideas, and now can you also tell us what the witness meant --

A I didn't try to tell you. I am avoiding trying to tell you what I think he might have meant.

MR. TESTA: I object to Mr. Wrenn's harassment of this witness by his conduct and by the questions he is asking.

Q If I have harassed you, Captain, I apologize. I won't harass you any more.

THE COURT: I don't think he intends to harass the witness, Mr. Testa. I am sure he will not do so. If you observe further, you will find it is not occurring.

Have you finished, Mr. Wrenn?

MR. WRENN: Yes, sir.

CROSS-EXAMINATION

BY MR. CICHANOWICZ:

Q Captain Wheeler, in the testimony that you gave in connection with some questions asked by Mr. Testa, you expressed I believe an opinion that the uprights or that the pipe might move because the uprights were out of line.

Do you recall that testimony?

A I do.

Q Have you heard any testimony here in court on any of the days that ycu have been sitting here that the uprights were out of line even slightly?

A I didn't hear it. I didn't hear anyone ask it.

Q You heard, did you not, Captain, testimony by one of the longshoremen that the pipe as it was laid in between these uprights was fitted snugly?

A Snugly to each other.

Q Yes.

A One pipe was snugged up against the other pipe, yes. I did hear some reference to that.

Q Do you remember the witness using the word snugly? Do you recall that?

A Yes.

Q At the time he was testifying about laying these pipes between the uprights.

Do you recall that?

A Yes.

Q There was no testimony by anybody that these pipes were not resting snugly and in line with each other?

A With each other, no. I didn't even intend to imply that. If they were resting -- if we can imagine that the two end uprights were fixed and the pipe was placed in, it would bear the -- the two end uprights themselves would sustain the weight of pipe. If the two intermediate uprights were set back a bit, they would not get any weight until the two end uprights were pushed aside or forced back into alignment. Then they would all equally start to share in the weight support.

Q You don't know whether that condition existed on the Mosqueiro or not?

A No, I don't.

Q That's just speculating on your part?

A It's a possible cause of this incident.

Q By the way, when you build a catwalk on top of, let's say, pipe in this instance, what does the catwalk rest on? Does it rest on the pipe or does it rest on something else?

A Usually rests on bearers that are actually held in place by the lashings that are put over the pipe.

Q When you say, "bearers" --

A Wood bearers, wooden beams.

Q These wooden beams, what do they rest on, just on the pipe, or do they rest on uprights?

A Rest on the pipe usually because they are not that wide to extend from the stow. They are contained and held in place by the lashings that are past over them.

Q You run the lashing over the catwalk?

A No, over the bearers to which the catwalk is attached or secured.

Q Which way do the bearers run on a load such as we had here? Wouldn't they run thwart ship?

A Usually the first bearer will run across the pipes or thwart ships. Then you will have cribbing, two other bearers cribbed on top of those two. The lashings go over those two cribbing pieces and then your catwalk is secured on top of those.

Q What about the end pieces that you referred to, what --

A The uprights?

Q Not the uprights. Aren't those fastened to the uprights, the bearers?

A Not necessarily. As I said --

Q You can do that?

A You can if you so desire.

Q That makes a pretty firm catwalk, doesn't it?

A If the top of the load level enough to support the bearers that you are going to rest the catwalk on, yes.

Q And if the pipe doesn't reach the top of the uprights, usually you do place the bearers on the uprights; is that right?

A You could, yes. It's perfectly proper if the conditions so indicate.

Q You referred to a ship foreman.

That is an employee of the stevedoring company, isn't he?

A Yes, sir.

Q As is the superintendent?

A Well, there are two superintendents. There's a superintendent, marine superintendent, for the shipping company and a superintendent for the stevedoring company.

Q When you were referring to superintendent, weren't you referring to the superintendent of the stevedoring company?

A That's right.

Q As I understand your testimony, you said that

the hatch boss does not inspect the work area if the superintendent or the ship foreman makes the inspection; is that correct?

A Yes. He knows and he has been informed that it's suitable to go to work, put the pipe in.

Q This inspection that is made by either the hatch boss or the ship foreman or the superintendent is what, usually a visual inspection?

A Yes, from the stevedore's viewpoint. The stevedoring supervision, it's just visual. They don't test it or take it apart or examine it structurally or go into the design or ask for the blueprints. It's just a visual inspection.

Q That is the type of inspection the ship's officer makes also; isn't that right?

A A little bit more detail. He's going to go to sea with that thing.

Q Are you telling us, Captain --

A He's --

THE COURT: One at a time, please.

You said he is going to go to sea, fine. Let's hear the next question.

Q Are you telling us, Captain, that the chief officer of the ship has to take apart this --

A I didn't say that.

Q But he has to make --

A A more detailed inspection.

Q A more detailed inspection?

A That's right.

Q When does he make that, after the cargo is loaded or before?

A I was going to answer that during the time that the pipe bed is being constructed he watches the construction and he keeps himself informed on what is going on. After it is completed and turned over to him by the carpentry boss, they inspect it jointly, together. Then he instructs the stevedore supervisor that it's completed and it's ready to load. Then the stevedore's supervisor directs his hatch boss to load it.

Q After he accepts it, he then turns it over to the stevedore?

A Yes.

Q And then the stevedore is in charge during the loading operation?

A The stevedore makes the visual inspection, assures himself there's no loose material in there as far as safety goes, the boards are secure they are going to be walking on and various other things, there's no lines lying

around on the deck.

This is the type of safety inspection that the stevedore's supervisor makes.

Q If they find anything during the course of the loading that is out of order, then they what, stop work?

A If it's within their capability to correct it, they correct it. If it's not, they call the mate.

Q Then they stop work?

A They call the mate.

Q And stop work?

A If there's an immediate peril, yes, stop work.

Q There is no testimony in this case, is there, that any of the longshoremen had to call either the hatch boss or the stevedore superintendent?

A Not insofar as I heard.

Q Or the ship foreman had to call the mate, did he?

A That's right, not insofar as I heard.

Q As a matter of fact, if you recall the testimony of the longshoremen, their testimony was that everything went along well; is that right?

A That's right, until the upright failed and the pipe moved.

Q Up until that time everything appeared to be all

right?

A That's the impression I got; yes, sir.

Q That is something that the visual inspection, if a visual inspection was made, would disclose, that everything was all right?

A The visual inspection is made prior to any pipe being put in that pipe bed.

Q While the pipe is being put in, the longshoremen, either the pier superintendent or the hatch boss, watches to see if anything developed during the course of the loading operation?

A They watch to see that they do their work properly.

Q As an example in this case, the pipe bed is adequate to hold the pipe that is being loaded?

A This decision was made before they put the first piece of pipe in there.

Q That's right.

During the course of the loading don't they watch to see that the condition remains the same?

A I don't think they watch -- when this happened, it happened instantaneously. The original decision was made that the pipe bed was adequate to sustain the load intended to be put in it. You don't stand there and watch

to see that it continues to be. If something does happen, it happens quick, in the wink of an eye.

Q That is the same thing as far as the chief officer is concerned? If he looks at it, he doesn't stand there and watch it, as you have indicated?

A That's right. He makes the decision that's adequate. The ship makes the decision that it's proper, the carpenter did his work. Now he turns around to the stevedore and tells him to load it.

Q When you were an officer on board ships, did you ever have pipe beds constructed on any of the ships that you sailed on?

A Yes, sir, I did.

Q Who did the construction of the pipe beds? Was it a marine contractor?

A No, it was the steamship company's carpentry department.

Q These were men who were on the payroll of the steamship company who did marine carpentry work?

A They did all the necessary carpentry work necessary in that fleet of ships.

Q The steamship company you were with had their own marine carpenters?

A Yes.

Q You heard the testimony here that the marine carpenters were somebody other than people employed by the defendant steamship company?

A Yes, I understand that.

Q In fact, Captain Wheeler, that is the way marine carpentry work is done in the Port of New York, isn't that right, by independent marine contractors?

A Some of it is done, some of it is done by the shipping company who does their own carpentry work and sometimes can do their own stevedoring work.

Q But in this case there's no question that this work was done by an independent contractor?

A Right. It's of no import to me.

Q These are people who are either or should be experienced in constructing, as an example here, pipe beds or other structures that are required for the carriage of cargo, right?

A Yes, they are experienced people.

Q One of the reasons that they are hired is because they are or should be expert in that field; is that correct?

A That's why they survive in the business, yes.

Q In fact, they are the people that probably know more about constructing pipe beds than --

A I can't go that far; no, sir. The ship should

know what it wants, and it tells the carpentry company what to do. They don't tell them how to do it, they tell them what to do.

Q When you say, "They tell them what to do," you mean construct the pipe?

A Right, capable of taking 18 inch pipe, 20 tons, whatever it might be, 30 foot long.

Q Once they do that, then it's up to the marine carpenter to provide the necessary material and to construct it in such a way that it will carry that pipe; is that correct?

A To accomplish it.

Q That is the way it's done, isn't it?

A That's right.

Q In other words, the details of the work and the manner in which it is done is done by the marine carpenter?

A To a degree, yes. It's done. I will agree, it's done. If it is satisfactory, it is accepted by the ship. If it is not satisfactory, it's rejected by the ship.

Q Was there anything in this case, any of the testimony that you have heard in this case, to indicate that when the work was completed on the pipe bed in this case it should have been rejected?

A I didn't hear the question put to anybody.

Q But you didn't hear any such testimony in the case, did you?

A No, I didn't hear the question.

Q In fact, the testimony is that the longshoremen loaded pipe into that bed for what, two or three hours prior to this accident?

A Right.

Q And everything appeared to be all right?

A That's right.

Q None of the uprights gave way, did they, prior to the time of the accident?

A Of course. Not prior to the time of the accident, no.

Q As a matter of fact, at or about the time of the accident the pipe bed was about 80 percent full; is that correct?

A I did gather that, yes.

Q If the pipe bed was not adequate or was not properly constructed, would anything have occurred before that time?

A Well, as the load is put into the pipe bed, the lateral forces being generated by the weight of the pipe is increasing and you get 80 percent. It did support 80 percent.

Maybe with 81 percent it would fail. I don't know.

Q 80 percent is a pretty good indication if you have made a visual inspection that this is adequate; isn't that right?

A I couldn't draw it that fine. I wouldn't want -- I would expect that pipe bed to have been built to carry three times or four times the expected forces that would be put on it; a safety factor of three or four would be incorporated into the construction of this pipe bed.

Q Captain Wheeler, you don't know why this upright broke, do you?

A No. I could speculate all over the lot, but I don't know, no.

Q You have no idea why; is that correct?

A That's right. I wasn't there.

Q You don't know whether this pipe bed could have carried 3 or 4 times the weight that was loaded in it?

A I think I know it didn't.

Q You do know?

A Yes. This is what this case is all about, isn't it?

Q Yes. And you know?

A From the testimony given in this case that it did fail --

Q You weren't there. You don't know what the condition of the pipe bed was at or about the time the accident occurred, do you?

A Before or after? Of my own knowledge, I don't know anything about this accident.

Q You don't know what happened to the bed prior to that time, do you?

A I just answered.

Q You don't know if it was hit by anything, do you?

MR. TESTA: Objection, if your Honor please. There has been no testimony in this case at any time that the bed was hit by anything.

THE COURT: There is testimony. I will permit the question on cross-examination. I think the answer is so obvious as to really not need the question.

I will ask the Captain to answer it anyway.

A I don't know from my own knowledge whether it was hit by anything.

Q Do you know who supplied the lumber --

A I heard here it came from New Jersey Export Carpenter Company. I heard testimony to that effect, from their yard it was.

Q Of course. The uprights are not rigid until there's some pipe put into the pipe bed?

A They are not absolutely rigid, no.

Q As the pipe is put in and more is put in, the more rigid it becomes?

A Yes, because then it becomes under stress and they are firm.

Q The uprights are there for what purpose, to hold the pipe primarily?

A To contain the pipe while it's being loaded so that it can be properly lashed and secured so that the ship can go to sea, and to also serve at the port of discharge; again to contain a pipe while the lashings are removed and the pipe is discharged.

Q This pipe was lashed subsequently, was it?

A I understood it was.

Q As far as you know, there was no problem in the carriage of this pipe?

A I didn't hear any, no, any further complications.

Q Thank you.

THE COURT: Mr. Duffy.

CROSS-EXAMINATION

BY MR. DUFFY:

Q Captain Wheeler, going back to the beginning of your testimony, you made mention of not having sufficient information supplied by the testimony of Mr. Montella con-

cerning the adequacy of the crib.

Would you tell us, sir, what some of the additional information you might have required.

A Well, the final detail, the details of construction and to know the elements of the pipe bed were so supported to resist the anticipated strains both in the magnitude of the strain and the direction of the strain.

For instance, Mr. Montella did not -- never mentioned the word kicker, a kicker to put in there to support the very base of that upright from moving toward the hatch combing.

Captain White did mention the word kicker. This had some significance to me that Mr. Montella depended on 60 penny nails to support, that these four by six's were merely nailed in place and they weren't supported by solid material. This is one of the bits of information that I would need before I could reach any conclusion.

Q Captain, in this use of nails with the fabrication of this pipe bed, you mentioned I believe also that you can't nail into steel?

A That's right.

Q And can you give us a general idea of how a pipe bed is secured on the deck of a ship?

A The components, the main bearer that -- the

4 by 6 that rests on deck is wedged against the base of the hatch combing and it reaches out and is wedged against the gunnel bar of the ship, the angle bar. It's a heavy piece of structural steel that it's leaning against and actually wedged in place. Each bearer on the deck is wedged in place and each bearer is laced in by nailing pieces of two by four or two by six from one to the other. You are making an intrical platform on which to erect these uprights and eventually to put these pipes in. The wood components are nailed to each other, but the entire cradle, if you will, is actually wedged into place on the ship. It's sufficient to support the weights of the pipe that's going to be put into it, and then when it's lashed, when the pipe is lashed, the cradle isn't lashed, and then the strains on the cradle are reduced or eliminated sometimes completely.

Remember, if the ship goes to sea and hits heavy weather, heavy sea comes over and wipes the cradle out of there, but the pipe will stay there. The pipe is solid.

In the event of anything like that, you must--before you take the lashings off that pipe, you then have to restore the cradle at the port of discharge.

Q Would it be correct to call this more or less rough carpentry?

A Yes.

Q When you say, "wedging," how was that wedging accomplished?

A It's two ways. Sometimes you cut the piece of wood slightly longer, just a fraction of an inch, eighth of an inch longer than you want, and you actually hammer that piece into place with sledge hammers.

Q How big are those hammers?

A Twenty pounds, ten pounds; anything up to 20 pound sledgers.

Q These timbers are pretty well banged into place?

A At the very end they are banged into place, yes, the bearers that's on deck, or any component that is going to be wedged -- that's one way of doing it. Another way of doing it is to cut maybe an inch short and actually drive a wedge. Then you will hammer the wedge into place without hammering the timber.

MR. DUFFY: That is all I have.

THE COURT: Mr. Testa.

REDIRECT EXAMINATION

BY MR. TESTA:

Q Captain Wheeler, there's a lot of talk about whose duty it was to inspect this pipe bed. I believe you said that in the first instance after the carpenter made it it was his duty to inspect it to see it was made properly;

is that right?

A That's right.

Q Then in the second instance it was the duty of the chief mate to inspect it to see if it was made right; is that right?

A That's right.

Q It was inspected twice before it was turned over to the stevedore?

A That's right.

Q The stevedore is told by the chief mate that it's all right to load the pipe into that pipe bed, isn't it?

A Yes.

MR. CICHANOWICZ: Objection.

THE COURT: Sustained.

Q And then when it's turned over to the stevedore, the chief mate doesn't walk off the ship, does he?

A No.

MR. CICHANOWICZ: Objection.

THE COURT: It's been answered.

Q Who is in charge of the overall loading operations, Captain?

A It depends on what you mean by overall loading. A real overall -- the whole big picture, the officer usually

is designated as the cargo officer. Of course, the captain is still in command of his ship.

Q He stays on that ship while the stevedore is loading it?

A Not always.

Q Some officers of the ship stay there and watch the stevedore?

A Yes, usually.

Q If they saw anything wrong with the way the operation was going on, they wouldn't allow it to proceed, would they?

A They would take steps to correct it, to make it conform to their satisfaction.

Q If they saw anything insofar as that pipe bed was concerned that gave them any cause for alarm or concern, they would do something about it, wouldn't they?

A Right.

Q And it would be their duty to do something about it, wouldn't it?

MR. CICHANOWICZ: Objection, your Honor.

THE COURT: Yes, it calls for a conclusion. Sustained.

Q You were a chief officer on a ship for many years, weren't you?

A Five, six years, yes.

Q If you were on a ship while stevedores were loading it, wouldn't it be your duty as chief officer to watch the operation to see that it proceeded properly?

A Insofar as the ultimate end, the stowage of the cargo in the ship, yes. How they did it, I wouldn't attempt to tell them.

Q If you saw something that you thought was improper, you wouldn't let it proceed, would you?

A Of course not.

MR. WRENN: Objection.

Q There was no testimony in this case that there was anything improper about this operation, was there?

A I didn't hear anything.

Q All the men testified that the operation proceeded along properly?

MR. WRENN: Objection to the form of the question.

THE COURT: Sustained as to form.

Q Did you hear any testimony in this case about anything improper in this operation?

A No, nothing firmly -- no firm testimony to this effect.

Q Did you hear any testimony that would cause any-

body to do anything about it, like the hatch boss or the chief officer or anybody else?

A I didn't hear any.

Q All right.

THE COURT: Any recross, gentlemen?

RECROSS-EXAMINATION

BY MR. WRENN:

Q Stevedores are hired because they are experts, right?

MR. TESTA: Objection, if your Honor please.

THE COURT: Yes, objection to the form. I think the jury can draw their conclusions for themselves as to why stevedores are hired and what their duties are now that they have heard all of this testimony. Sustained.

Q While the stevedores are loading the ship, that portion of the ship is turned over to them; isn't that true?

MR. TESTA: Objection, if your Honor please. That is not correct.

THE COURT: That is a conclusion.

I will sustain the objection.

MR. WRENN: Your Honor, this is cross-examination.

THE COURT: Yes, but you can restate your question. I will permit you to inquire into the area.

Q Why does the ship hire the stevedores?

A Because --

MR. TESTA: If your Honor please, I object to this.

THE COURT: Overruled.

MR. TESTA: It's obvious, your Honor.

THE COURT: I know it is. Let's get on with it.

A The stevedore is equipped -- has the facilities to accomplish the loading of the ship. Every steamship company does not keep 500 fork lift trucks or a thousand, ten thousand pallets or a whole warehouse full of rope shackles, blocks, crowbar rollers. Every steamship company doesn't have these things. It would be nonsense for every steamship company to have it.

A contractor does have this equipment and he has a labor supply, a source of men. He has the longshoremen's union and he has the men and he carries the payroll and he provides for the vacation and welfare and all fringe benefits.

Q The stevedore has expertise in this area, loading and unloading ships?

A He provides the supervision necessary to accomplish the material handling involved in putting the cargo in place where the ship tells him to put it.

Q He has expertise in the area of loading and un-

loading ships, isn't that right?

A As regards what?

Q Loading and unloading ships.

A As regards material handling, yes. As regards ship board stability and contamination of one cargo with another, he does not have. The ship has that.

Q We are not talking about contamination as far as this case is concerned, we are talking about the problem of loading and unloading.

MR. TESTA: If your Honor please, I object to any testimony now about expertise or the proper manner of doing anything. I think now counsel is invading the province of the court and touching on a subject that should not be inquired.

THE COURT: Overruled.

Q The stevedores are hired because they have expertise in the loading and unloading of ships, isn't that right?

A Not the way I describe it. The stevedore is an expert in material handling. He will put anything where you tell him to put it.

Q The manner of getting it aboard the ships, the manner of loading it, that is his expertise?

A If you call that loading, yes. He's the expert in

bringing it aboard the ship.

Q You as captain would rely upon his expertise in the manner in which he loaded and unloaded your ship; isn't that right?

A If he wasn't, that's right.

Q If he didn't, he wouldn't be there?

A The next load he wouldn't be there. He might finish that load out.

Q ITO has been in the business for many, many, many years; isn't that right?

A That's right.

Q Can't we assume that they have degree of expertise?

A In material handling, yes, right. They do what they are told.

Q They do what they are told with regard to placement, but nobody tells them how or the manner of getting cargo from one place to another?

A That's true.

MR. TESTA: Objection, if your Honor please.

THE COURT: He answered the question.

Q Thank you.

THE COURT: Anything else, gentlemen?

Thank you very much, Captain.

(Witness excused.)

* * * *

counsel agree?

MR. DUFFY: Yes, your Honor.

MR. CICHANOWICZ: Yes, your Honor.

MR. TESTA: Yes, your Honor.

MR. WRENN: Yes, your Honor.

THE COURT: The document is received in evidence subject to that stipulation. When, as and if you want to see the document, you will keep the stipulation in mind that there are explanations to certain portions of that document which relate to a longshoremen's strike and a subsequent increase in the hourly pay rate of longshoremen.

Mr. Testa.

MR. TESTA: The third-party defendant rests at this time, your Honor.

THE COURT: Plaintiff?

MR. DUFFY: Plaintiff has no rebuttal witnesses, your Honor.

THE COURT: Plaintiff rests on its entire case?

MR. DUFFY: Yes, your Honor.

THE COURT: Defendants?

MR. WRENN: I rest, your Honor.

MR. CICHANOWICZ: Rest.

MR. TESTA: Rest.

THE COURT: Very good.

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Ladies and gentlemen of the jury: You have now heard all of the testimony, and we have had introduced into evidence all of the exhibits in this case.

I will excuse the jury now with the same admonition I have given you on all occasions when you have left the courtroom and left the building. Please do not discuss this case among yourselves, nor remain within the hearing of anyone else who may be discussing the case. Keep an open mind on the case.

Finally, I instruct you to return here to your juryroom tomorrow morning at 9:30 a. m., all eight of you. At that hour we will begin the summations, and following the summations of all four counsel I will charge the jury and submit the case to you.

It is my present expectation that the charge will be completed just prior to your going to lunch and then the six members of the jury to whom the case will ultimately be submitted will proceed to lunch and then return to deliberate. If we move at a quicker pace than that, you may be deliberating before you go to lunch.

I would ask the two alternate jurors to be with us tomorrow through the charge, and I expect that if all the other jurors are here and well, I will be dismissing you. I will give the case to the other jurors. In the event

someone becomes ill or can't proceed with the case, the first alternate and the second alternate will be available to substitute for the other jurors.

I do wish you all a safe trip home, a good night and a safe trip back in the morning. See you tomorrow morning at 9:30 a. m.

(Jury absent.)

THE COURT: Before I proceed with the matter of your respective requests to charge, I would ask if any counsel have further motions which they wish me to entertain at this time.

MR. DUFFY: I would, your Honor, on behalf of plaintiff repeat all my prior motions.

THE COURT: I will rule the same as I have before in connection with each of the motions which you are restating at this time.

MR. DUFFY: Thank you, your Honor.

MR. WRENN: I probably should move for a directed verdict on the cross-claim in the third-party action.

THE COURT: The motion is denied.

MR. CICHANOWICZ: I just renew the motions made at the end of my case and also move for a directed verdict on the third-party claim and cross-claim?

THE COURT: All of your motions are denied.

MR. TESTA: I would also renew my motions, your Honor, and for a directed verdict on the third-party action in favor of the third-party defendant.

THE COURT: Your motions also are denied, Mr. Testa.

MR. TESTA: For the reasons stated before, your Honor?

THE COURT: Yes. I would assume that all of you are restating the same objections and the same observations, the same motions that you made previously, and I will adhere to my prior rulings?

We will proceed now to consider your requests for instructions. I will rule on those and I will inform you in very brief and general outline as to the substance of my charge.

Turning first to plaintiff's requests to charge.

The following requests will be charged in substance: One, three and four, 7 and 8, 11 and 12, 14, 20 and 21.

The following requests are refused, although you may find that portions of them do appear in the ultimate charge: 2, 5 and 6, 9 and 10, 13, 15 through 19.

MR. DUFFY: If your Honor please, are my requests to be marked and do I have an exception?

THE COURT: I have been filing them when I am finished with the case, so they will become part of the court record.

MR. DUFFY: Fine.

THE COURT: All right.

Turning now to the requests to charge of the defendant and third-party plaintiff, New Jersey Export Marine Carpenters, Inc. I will charge in substance 1, 2, 6 and 7, 10 and 11 and 15.

I refuse to charge 3 through 5, 8 and 9, 12 through 14.

Turning to the requests to charge of defendant and third-party plaintiff, Netumar. I will charge in substance requests 1 through 9, 13, 16, 17, 20, 22, 24.

I refuse to charge requests 10 through 12, 14 and 15, 18 and 19, 21, 23, 25.

MR. TESTA: If your Honor pleases, I don't have a copy of these. I would like to know what is being done here for the record.

THE COURT: I am sure Mr. Cichanowicz will give you a copy.

MR. TESTA: At this time, your Honor, I have to take a position with respect to this. Without having them before me it's a little difficult. That is the problem.

THE COURT: In the normal course I would have expected counsel to have served their requests prior to their filing them with the court.

Let me have our court reporter review those again for you.

(Record read.)

MR. TESTA: If I may just have a moment, your Honor, to correlate these with the other requests so I can see what position, if any, I would like to take, I would appreciate the period.

THE COURT: You may do so.

(Pause.)

30 MR. TESTA: If your Honor pleases, at this time I would like to take exception to charge number 22.

THE COURT: I am not going to charge it in those words.

MR. TESTA: I would like to take exception for the record, that your Honor will charge it in some language.

I would like to take exception to your Honor indicating that you will charge number 17, whether in that language or other language.

I would take exception on the record to your Honor's indication that you will charge number 20, whether in substance or in the language indicated.

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I would take exception to your Honor's indication that you intend to charge number 22, either in substance or in the language indicated.

And also to number 24, I take exception to your Honor's indication that you will charge that, either in the language indicated or in substance.

THE COURT: You have your exceptions.

MR. TESTA: Thank you, your Honor.

MR. WRENN: Your Honor, may I be heard on granting of plaintiff's attorneys requests? Generally all of the requests, they speak of the defendants and they talk about unseaworthiness. Presumably your Honor is not going to charge that I have -- if I understand your Honor, you are going to charge these in essence?

THE COURT: Let me put it this way: I am going to charge a number of things. Where I don't charge something in the words that you give me, but I have something on the subject in there, I indicate to you that I will charge in substance. What you will have to do tomorrow when I deliver the charge, and I will give you an outline of the charge now, is listen very carefully, and when I complete my charge you may step to the side bar or into the robing room before the jury is sent to deliberate, and at that time you may except to portions which I have delivered and request that I supple-

ment the charge if you believe that there is something essential that should be included which has not been. You will have that opportunity before the jury retires to deliberate it.

MR. WRENN: Essentially right now I would like to point out to the court that I object to these charges joining the respective duties and the respective defendants because I think they are independent and the duties vary according to our respective positions. That's all.

THE COURT: Two things. I will try to delineate that in the charge, and I have prepared some special interrogatories that I think are going to help on that matter. We will get to that shortly.

I would like to proceed now, if I may, to rule on the third-party defendant's requests. That will complete the rulings on the requests to charge, and then I will briefly indicate the outline of my charge.

Turning now to the third-party defendant's requests to charge. I will charge in substance requests 1, 4 through 10, 14, 28 through 32.

I refuse to charge 2 and 3, 11 through 13, 15 through 27 and 33 through 40.

Turning to the third party-defendant's additional requests to charge. I will charge in substance request number

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10. I refuse to charge requests 1 through 9.

To the extent that I have refused to charge, you have your exceptions. To the extent that I charge or indicated that I will charge in substance, I ask you to listen to my charge when it is delivered tomorrow, and, as I have indicated, before the jury will proceed to deliberate, I will give you the opportunity to either except or request additional instructions.

Turning now to the outline of my charge, which I will just indicate to you very briefly. Following an introduction I shall charge on seaworthiness, I shall charge on negligence, I shall charge on breach of warranty of workmanlike performance by New Jersey Export, I shall charge relative to expert witnesses, of whom there have been several, I will charge on burden of proof, I will charge on assumption of risk, I will charge on damages, I will charge on contributory negligence, I will charge on breach of warranty of workmanlike performance by the third-party defendant, I will charge on credibility, I will indicate, of course, that the verdict of this jury must be unanimous. That constitutes the outline of my charge.

Is there something that you wish to say, Mr. Duffy?

MR. DUFFY: Proximate cause, your Honor.

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I note that you have denied my request number two and you did not in your informal outline mention --

THE COURT: I am sorry, yes. Let me suggest that in noting in my outline what I was going to charge, I left out the mention of that, and I do have a section in here on proximate cause which, in essence, is an unbroken chain of events flowing from an unseaworthy condition or negligent act and leading to the injury complained of. I do charge proximate cause. That was an omission on my part.

MR. DUFFY: There may be more than one proximate cause.

THE COURT: Yes.

MR. DUFFY: I will be listening.

THE COURT: I would suggest that you listen carefully. I will charge on proximate cause. As a matter of fact, I think the special verdict that I am going to turn to just for a moment before we leave tonight will be very helpful to the jury in a case such as this. I had been working on this during the lunch hour, and so far I have gotten up to question 9. Let me give you the first 9 questions that I plan to ask the jury. As I say, I haven't finished yet. I would be glad to accept any suggestions.

One, has plaintiff established his claim that the defendant, New Jersey Export Marine Carpenters, Inc.,

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was negligent and that its negligence was a proximate cause of plaintiff's accident?

Two,has plaintiff established his claim that the defendant, Cia. De Nav. Mar. Netumar, was negligent and that its negligence was a proximate cause of plaintiff's accident?

Three, has plaintiff established its claim that the ship, SS Mosqueiro, was in an unseaworthy condition and that this unseaworthiness was a proximate cause of plaintiff's accident?

Four, has plaintiff established his claim that the defendant, New Jersey Export Marine Carpenters, Inc., breached any warranty of workmanlike performance which it owed plaintiff and that this breach of warranty was a proximate cause of plaintiff's accident?

Answer yes or no.

Five, if the answer to questions 1 and 4 is no, your verdict is for the defendant New Jersey Export Marine Carpenters, Inc., and you should put an X here.

If the answer to questions 2 and 3 are no, your verdict is for the defendant Cia. De Nav. Mar Netumar and you should put an X here.

If the answer to question 1, 2, 3 or 4 is yes, what is the total amount of damages to plaintiff?

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Eight,in the event you have found above that plaintiff is entitled to recover, do you find that the defendants have established their claims that plaintiff was himself negligent and that his negligence was a proximate cause of the accident?

Answer yes or no.

Nine, if the answer to question eight is yes, what percentage did plaintiff's fault so contribute?

I have a space for a percent.

(If the answer to question 8 is no, do not answer this question.)

If you entered a percentage on this question, fill in its equivalent dollar amount here.

Question 10, which would follow from this, would be to subtract the dollar amount stated in question 9 from the total amount of damages stated in question 7 and enter here the difference, which will be the net amount of damages you find the plaintiff is entitled to recover, leaving a space where we will have question 7, total dollars, minus question 9, total, giving us a net recovery in dollars.

I have reached that point so far, and I am going to have to work on the remaining questions which, of course, will include whether the third party defendant breached its warranty of workmanlike performance, and we have to cover

the matters of indemnity and the matters of the cross-claims.

May I suggest that the balance of the questions might be considered by each of you, and I would be happy tomorrow when I have prepared my own to not only hear from you, but if you have additional suggestions, that I will consider them tomorrow morning.

Is there anything else tonight, gentlemen?

MR. TESTA: No, your Honor.

MR. DUFFY: No, your Honor.

THE COURT: We will adjourn and we will recess until tomorrow morning at 9:30.

Thank you.

(Adjournment taken until November 2, 1973 at 9:3 a. m.)

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JOAQUIN CONCEICAO

vs

NEW JERSEY EXPORT MARINE CARPENTERS, INC., and CIA. DE NAV. MAR. NETUMAR,

vs

71 Civ 2550

INTERNATIONAL TERMINAL OPERATING CO., Inc.

New York, N. Y.

November 2, 1973 - 12:07 p.m.

- - -

(In open court; jury present.)

THE CLERK: The Court is about the charge the jury. Any spectators wishing to leave will please do so now or remain until the Court has completed its charge. The marshals will lock the door.

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CHARGE OF THE COURT

THE COURT: (Ward, D. J.) Ladies and gentlemen of the jury, we have come to the point in the trial where it is my function to instruct you as to the law. Following my charge on the law, you will retire and deliberate in order to render a verdict.

In accord with the customs in our court, the juror sitting in Seat Number 1, Mr. Walter A. Becker, will serve as the foreman of the jury.

ELP 2

Most of the issues in this case have centered around matters that are not normally within our common experience or, at least, the experience of most of us. It has been evident to me from the very start of the trial that each of you has paid very close and absorbed attention to the evidence as it came in, and that you are prepared to discharge your final duty.

This duty is to decide the fact issues in the case. As I have indicated on prior occasions, you members of the jury are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the evidence as between witnesses or otherwise, and you draw whatever reasonable inferences may be warranted from the facts as you and you alone determine them.

In your determination of the facts, you rely upon your recollection of the evidence. Anything that counsel for any of the parties may have said during the progress of the trial with respect to any fact matters or included in any question or advanced in summation is not to be taken in place of or in substitution for your own independent recollection of the evidence. So, too, anything the Court may say during the course of these instructions with respect to any fact matter, again, is not to be taken in place of your own

ELP 3

independent recollection, which governs at all times.

I do not want you to infer from any questions which I have asked during the trial or any comments which I may have made during the trial that I have any position with respect to this case. I am here to instruct you as to the law, and that is my function. You are here to try the issues of fact. That is your function.

If you do not recall something and want to refresh your recollection once you have retired to the jury room, you may by sending out a note to the Court call either for the exhibits which have been introduced into evidence in this case, or you may request that portions of the testimony be read to you by the court reporter. In that event, you will be brought back into the courtroom and the portions of the testimony which you wish to be read will be read to you. You will then return to the jury room and continue your deliberations.

As I indicated, my function at this point is to instruct you as to the law that is applicable to the case. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

a1

What we are really trying here are the issues in two separate cases. First, there is the action brought by Jaoquinn Conceicao against New Jersey Export Marine Carpenters, Inc., and Cia De Nav. Mar. Netumar, which I may sometimes refer to as Netumar, the owner of the SS Mosqueiro.

You will recall that the SS Mosqueiro was the vessel on which Mr. Conceicao was assigned to work on November 5, 1970, when he sustained the injuries which are the subject of this lawsuit. That is the first case that you will be trying.

Joaquinn Conceicao against the defendants New Jersey Export Carpenters, Inc., sometimes called the carpenters, and Netumar, who I will sometimes refer to as the ship owner.

Mr. Conceicao contends that the defendant New Jersey Export Marine Carpenters, Inc., was negligent in failing to furnish plaintiff a fit and safe pipe bed structure and fence and a safe place to work. The plaintiff contends that the carpenters permitted and allowed the pipe bed structure and fence to be and to remain in an unfit, weak, inadequate and unsafe condition.

Plaintiff charges that the defendant, New Jersey Export Marine Carpenters, Inc., had failed to properly design a pipe bed and fence that was adequate and sufficient for the cargo to be loaded. He says that they failed to warn him of that and failed to exercise due care for his safety.

el 2

He also contends that New Jersey Export Marine Carpenters, Inc., is liable to him for its breach of warranty of workmanlike performance, a matter which I will combe back to a little later in my charge.

The plaintiff contends that Netumar was negligent in failing to furnish him a safe place to work and a seaworthy vessel, in causing, permitting and allowing the pipe bed structure and fence to be and to remain in an unfit, weak, inadequate and unsafe condition.

He also charges that Netumar was negligent in failing to properly supervise, that is, that Netumar is liable to him in failing to properly supervise and inspect the construction and design of the pipe bed structure, in failing to warn him, in failing to exercise due care for his safety, and in failing to properly supervise the cargo operations and the manner used to load, stow and carry the cargo.

He further contends that the SS Mosqueiro was unseaworthy in that it was not a safeplace to work and in that the pipe bed structure and fence was not reasonably fit for the uses intended and was weak, inadequate, improperly designed and constructed; and that the method used for the stowage of cargo was not suited for safe operations.

He sustained certain injuries to his left foot, leg, toes, which you will recall from the testimony, and he

indicates damage, and he states that he is entitled to a recovery.

He indicated to you and his counsel indicated in summation that he seeks to be compensated for lost earnings, for discomfot in the past, in the future, any possible diminution of earnings which might result in the future as well.

We will come back to the matter of damages at a later point in the charge.

It is the contention of the defendant New Jersey Export Marine Carpenters, Inc., that the injuries which the plaintiff sustained on November 5, 1970 were not caused or contrib uted to by any negligence nor breach of warranty on its part, or that of its agents, servants, and/or employees, but were caused by the conduct of the plaintiff and/or his fellow employees, and/or third parties, over which the carpenters had no control in breaching their warranty of workmanlike performance in the manner, method and execution of loading pipe aboard the SS Nogueira.

In the alternative, the carpenters contend that if you should hold that they are liable to the plaintiff, they are entitled to be indemnified by either the ship owner, Netumar, or International Terminal Operating Co., Inc., or both, on the grounds that eitheror both were negligent,

el 4

supplied theplaintiff with an unseaworthy vessel and/or breached their respective warranties.

The indemnity sought is for the amount of any verdict plus interest, costs and disbursements.

It is the contention of the defendant Netumar that the injuries which the plaintiff sustained on November 5 were not caused or contributed to by any negligence on its part or that of its agents, servants and employees,nor by any unseaworthiness of the Mosqueiro, its appurtenances, appliances and/or equipment.

In the alternative, the ship owner contends that if it should be held liable to the plaintiff for any reason, it is entitled to indemnity from either the carpenters or International Terminal Operating Company, Inc., or both; on the grounds that either or both breached their warranty or workmanlike performance and/or were negligent.

The indemnity should include not only the amount of the plaintiff's recovery, but certain additional costs, to which I will not make reference at this time.

It claims also that the plaintiff's negligence contributed to his accident.

In the event you find either or both of these defendants, that is, the carpenters or the ship owner, liable to the plaintiff, there is in turn the second case,

el 5

the claims of the carpenters and the ship owner against -- actually, I should include here claims against each other to which I have just made reference, and the so-called third party actions by the carpenters and the ship owner against International Terminal Operating Company, Inc., Mr. Conceicao's employer.

I may sometimes refer to International Terminal Operating Company, Inc. as ITO, or the stevedore; or, alternatively, the third party defendant.

I indicated to you a few moments ago the contentions of the ship owner and the carpenters relative to the plaintiff, just a moment or two to indicate the contentions of the third party defendant, ITO. The third party defendant contends that it was not guilty of any breach of warranty nor of any negligence contributing in any way to the plaintiff's injuries.

ITO contends further that the carpenters were negligent in failing to construct the proper pipe bed and fence and that this negligence was the cause of any injuries which the plaintiff sustained.

ITO further contends that it is not liable to indemnify the third party plaintiffs in the amount of any judgment recovered by the plaintiff, Mr. Conceicao, or in any other amount.

el 6

The stevedore, ITO, contends that it performed the stevedoring services which it was hired to perform aboard the vessel in a safe, proper, prudent, and workmanlike manner; that it did not violate any obligation owed by it to the third party plaintiffs, either express or implied and that the conduct of the third party plaintiffs precludes any indemnity or recovery from ITO.

ITO also contends that the injuries sustained by Mr. Conceicao were caused, brought about, and contributed to by the sole negligence or Mr. Conceicao and of the third party plaintiffs, or by the unseaworthy condition of the vessel, a condition which was not, according to ITO, created or contributed to in any way by it.

ITO contends that in the event that the third party defendant, ITO, be adjudged liable, it is then entitled to recover indemnity from the plaintiff by reason of his breach of the terms and conditions of his contract of employment by the third party defendant, and his failure to perform his job duties in a safe, proper, prudent, and workmanlike manner. And in the event that the third party defendant, ITO, be adjudged liable, ITO contends that it should recover over against the third party plaintiffs because, according to ITO, the third party plaintiffs have breached their warranties, duties and obligations to it.

el 5

He also contends that New Jersey Export Marine Carpenters, Inc., is liable to him for its breach of warranty of workmanlike performance, a matter which I will come back to a little later in my charge.

The plaintiff contends that Netumar was negligent in failing to furnish him a safe place to work and a seaworthy vessel, in causing, permitting and allowing the pipe bed structure and fence to be and to remain in an unfit, weak, inadequate and unsafe condition.

He also charges that Netumar was negligent in failing to properly supervise, that is, that Netumar is liable to him in failing to properly supervise and inspect the construction and design of the pipe bed structure, in failing to warn him, in failing to exercise due care for his safety, and in failing to properly supervise the cargo operations and the manner used to load, stow and carry the cargo.

He further contends that the SS Mosqueiro was unseaworthy in that it was not a safe place to work and in that the pipe bed structure and fence was not reasonably fit for the uses intended and was weak, inadequate, improperly designed and constructed; and that the method used for the stowage of cargo was not suited for safe operations.

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indicates damage, and he states that he is entitled to a recovery.

He indicated to you and his counsel indicated in summation that he seeks to be compensated for lost earnings, for discomfort in the past, in the future, any possible diminution of earnings which might result in the future as well.

We will come back to the matter of damages at a later point in the charge.

It is the contention of the defendant New Jersey Export Marine Carpenters, Inc., that the injuries which the plaintiff sustained on November 5, 1970 were not caused or contrib uted to by any negligence nor breach of warranty on its part, or that of its agents, servants, and/or employees, but were caused by the conduct of the plaintiff and/or his fellow employees, and/or third parties, over which the carpenters had no control in breaching their warranty of workmanlike performance in the manner, method and execution of loading pipe aboard the SS Mosqueiro.

In the alternative, the carpenters contend that if you should hold that they are liable to the plaintiff, they are entitled to be indemnified by either the ship owner, Netumar, or International Terminal Operating Co., Inc., or both, on the grounds that either or both were negligent,

el 7

supplied theplaintiff with an unseaworthy vessel and/or breached their respective warranties.

The indemnity sought is for the amount of any verdict plus interest, costs and disbursements.

It is the contention of the defendant Netumar that the injuries which the plaintiff sustained on November 5 were not caused or contributed to by any negligence on its part or that of its agents, servants and employees,nor by any unseaworthiness of the Mosqueiro, its appurtenances, appliances and/or equipment.

In the alternative, the ship owner contends that if it should be held liable to the plaintiff for any reason, it is entitled to indemnity from either the carpenters or International Terminal Operating Company, Inc., or both; on the grounds that either or both breached their warranty of workmanlike performance and/or were negligent.

The indemnity should include not only the amount of the plaintiff's recovery, but certain additional costs, to which I will not make reference at this time.

It claims also that the plaintiff's negligence contributed to his accident.

In the event you find either or both of these defendants, that is, the carpenters or the ship owner, liable to the plaintiff, there is in turn the second case,

el 8

the claims of the carpenters and the ship owner against -- actually, I should include here claims against each other to which I have just made reference, and the so-called third party actions by the carpenters and the ship owner against International Terminal Operating Company, Inc., Mr. Conceicao's employer.

I may sometimes refer to International Terminal Operating Company, Inc. as ITO, or the stevedore; or, alternatively, the third party defendant.

I indicated to you a few moments ago the contentions of the ship owner and the carpenters relative to the plaintiff, just a moment or two to indicate the contentions of the third party defendant, ITO. The third party defendant contends that it was not guilty of any breach of warranty nor of any negligence contributing in any way to the plaintiff's injuries.

ITO contends further that the carpenters were negligent in failing to construct the proper pipe bed and fence and that this negligence was the cause of any injuries which the plaintiff sustained.

ITO further contends that it is not liable to indemnify the third party plaintiffs in the amount of any judgment recovered by the plaintiff, Mr. Conceicao, or in any other amount.

el 8a

The stevedore, ITO, contendsthat it performed the stevedoring services which it was hired to perform aboard the vessel in a safe, proper, prudent, and workmanlike manner; that it did not violate any obligation owed by it to the third party plaintiffs, either express or implied and that the conduct of the third party plaintiffs precludes any indemnity or recovery from ITO.

ITO also contends that the injuries sustained by Mr. Conceicao were caused, brought about, and contributed to by the sole negligence of Mr. Conceicao and of the third party plaintiffs, or by the unseaworthy condition of the vessel, a condition which was not, according to ITO, created or contributed to in any way by it.

ITO contends that in the event that the third party defendant, ITO, be adjudged liable, it is then entitled to recover indemnity from the plaintiff by reason of his breach of the terms and conditions of his contract of employment by the third party defendant, and his failure to perform his job duties in a safe, proper, prudent, and workmanlike manner. And in the event that the third party defendant, ITO, be adjudged liable, ITO contends that it should recover over against the third party plaintiffs because, according to ITO, the third party plaintiffs have breached their warranties, duties and obligations to it.

ELP 9

There you have the parties and their contentions. You have the plaintiff, Mr. Conceicao; the defendants and third-party plaintiffs, whom I will describe as the carpenters and the ship owner; and the third-party defendant, ITO, the stevedore, Mr. Conceicao's employer.

The principles of law which govern in each case are different. We will first consider the plaintiff's case against the carpenters and the ship owner, since how you decide this determines whether you ever reach the claims of the carpenters and the ship owner against each other and their cases against ITO, the stevedore.

You understand, of course, that since the carpenters, the ship owner and the stevedore are corporations, they act through their officers and employees and are responsible for acts committed or omitted by them in the performance of their duties.

The first matter I wish to try to explain to you is the matter of negligence. You noted in my description of the contentions I stated that the plaintiff contended that the carpenter and the ship owner were negligent. I shall try first to explain to you what the term "negligence" means.

In their relation to the plaintiff, the carpenters and the ship owner had a duty to exercise, through their employees, ordinary care. Ordinary care is that which would

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be the conduct of a reasonable and prudent person under similar circumstances. It is a breach of that duty of ordinary care if the defendant's employees conducted themselves either through actions or failure to act in such a manner as to create a risk of injury to the plaintiff which a reasonable and prudent person would have anticipated and guarded against under similar circumstances.

If you find that acts of employees of the defendant, that is, the carpenter and the ship owner, or failure to act created a risk of harm to the plaintiff which reasonable persons similarly situated would have anticipated and guarded against, that would mean that you would find that particular defendant negligent.

You are not to guess or speculate as to whether either or both of the defendants were negligent, nor can you regard the mere fact of the accident as a basis for finding either or both of the defendants responsible.

Your determination must be based upon facts or reasonable inferences from facts.

It is important for you to bear in mind that a finding of negligence of either or both of the defendants, without more, is not enough to hold the defendants liable in damages. Their liability also depends on whether the negligence was a proximate cause of the injury. To be a proximate

ELP 11

cause, there must be a direct causal connection between the negligence and the injury. In other words, there must be an unbroken chain of events flowing from the negligence and leading to the injury.

Assuming that you find the defendants or either of them negligent, you must then decide whether there was this causal connection between the negligence and the injury to the plaintiff.

I am going to leave the matter of negligence now and proceed to the matter of breach of warranty, then cover the matter of unseaworthiness which is alleged, and then try to explain how all three fit in the context of this case.

The plaintiff also seeks for recovery of damages from New Jersey Export Marine Carpenters, Inc. for breach of warranty of workmanlike performance of the carpentry work in connection with its construction of the pipe bed on the S/S Mosqueiro.

If you find that the carpenters breached their warranty to plaintiff, that is, that the carpenters failed to perform their services in a safe, proper and workmanlike manner and that as a result Mr. Conceicao sustained his injury, the plaintiff is entitled to recover damages from the defendant carpenters. In other words, the plaintiff is entitled to be made whole for his injuries.

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The obligation owed by the carpenters to plaintiff was to perform their work with reasonable safety and in a proper and workmanlike manner.

The carpenters deny that they breached their warranty to plaintiff. The law does not require perfection. The carpenters contend that they performed their work in a reasonably competent manner and, accordingly, urge you to find that the plaintiff is not entitled to recover on this claim.

The plaintiff has the burden of proof of establishing that the carpenters breached their warranty of workmanlike performance. The plaintiff must do this by a fair preponderance of the evidence. The carpenters' warranty of workmanlike performance required them to build a fit and safe pipe bed.

So that is what you have to look at. That is the question: whether or not the carpenters built a fit and safe pipe bed.

The carpenters' warranty also extended to their employees and warranted that they would be employees who would not be negligent in the performance of their duty, which was to build a fit and safe pipe bed. Ordinarily, if you find negligence on the part of any employee of the carpenters, then you have sufficient upon which to find that the carpenters

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breached their warranty of workmanlike performance to the plaintiff.

The failure of the plaintiff to discover and correct any breach of warranty by the carpenters affords no defense to the plaintiff's claim.

If you find by a preponderance of the evidence that the plaintiff has established that the carpenters violated the warranty of workmanlike performance as a proximate result of which the plaintiff was injured, the plaintiff is entitled to recover, unless by some action or inaction on his part he prevented, hindered or seriously hampered the carpenters from performing their work in a workmanlike manner.

Again, I said I will tie up a number of things shortly, but I would like to turn to the third of the areas where the plaintiff's contentions lie. I have now mentioned negligence and breach of warranty.

Plaintiff also seeks recovery for damages from the ship owner under an ancient law of the sea known as the warranty of seaworthiness.

This so-called warranty of seaworthiness imposes on the owner of a vessel the duty to supply the crew members with a seaworthy vessel; that is, one reasonably fit for its intended purpose or use. Or, stating it another way, one reasonably fit for crew members to discharge their functions.

ELP 14

This not only means that the ship should not have holes in it so that it would take in the sea water and sink; it means more than that. The ship owner's duty to supply a seaworthy vessel extends to furnishing appurtenances which are reasonably fit for their intended use.

The plaintiff contends that the vessel was unseaworthy in that it was not a safe place to work, and specifically that the pipe bed was not fit for its intended use.

The ship owner's duty is a continuing one, and to use legal language, it is non-delegable; that is to say, it cannot be passed on to another person.

The plaintiff, as you know, was not a sailor. He was not a regular member of the ship's crew. He was a longshoreman employed by ITO, the third-party defendant, which had been engaged to perform stevedoring services aboard the ship. However, since Mr. Conceicao was engaged to perform a job on board the vessel usually performed by the ship's crew, he too was entitled to the benefit of the warranty of a seaworthy vessel just as if he was a regular member of the ship's crew.

The ship owner's duty to supply such a seaworthy vessel, as I have already noted, extended to furnishing appurtenances which are reasonably fit for their intended use. The ship owner's duty to supply a seaworthy vessel to the

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plaintiff was completely independent and separate from whatever duties his own employer, ITO, owed to him.

The ship owner's duty to supply a seaworthy vessel is absolute. If it fails in that duty and as a proximate result a crew member or, as in this case, a man who does a crew member's work is injured, then the ship owner is liable for the resulting damages.

This absolute duty is imposed even though the ship owner may have been free from fault and whether or not the ship owner's knew of the alleged unseaworthy condition.

Liability for an unseaworthy condition does not in any way depend on negligence, fault or blame. In short, even the exercise of reasonable care does not relieve the ship owner of its absolute duty to those engaged in ship's service to furnish a seaworthy vessel.

It is the fact of seaworthiness, if you should so find, which renders the ship owner liable if as a proximate result a man working aboard ship sustains injury.

If you find the ship unseaworthy or the defendants negligent or the carpenters to have breached their warranty of workmanlike performance, you must then determine whether such fault was a proximate cause of the injury complained of.

A few moments ago I mentioned in another context proximate cause. I should like to mention it again. By

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"proximate cause" I mean simply that there must be a direct causal connection between the defendant's negligence or the carpenters' breach of warranty or the ship's unseaworthiness, and the plaintiff's injury. To constitute a proximate cause, not only must the cause actually contribute to the result, but such a cause must not be a remote one. It is a cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, helps to produce the injury and without which the accident would not have happened.

I should now like to comment on certain matters which took place during the course of the trial. You recall that certain of the testimony was read. It was read from things which are called depositions. For example, Richard A. Piper testified by deposition. Of course, you were not able to see Mr. Piper or to observe his demeanor. Otherwise, you are to judge his credibility by the same standards as are applied to those witnesses who testified from the witness stand.

I will discuss the matter of credibility a little later in my charge.

There were in the case two types of witnesses. One group could be called fact witnesses: those who actually saw something and reported to you what they saw. And then, another type: expert witnesses. I should like to comment on

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that for a moment. I did comment on it during the course of the trial. Let me comment again.

When a case involves a matter requiring special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the benefit of the Court and jury. The opinion stated by each expert who testified before you was based on particular facts. In this case the expert witnesses included Doctors Graubard, Lodico and Tagliagambe; Captain White; William Montella and Captain Wheeler.

The attorneys who questioned them asked them to assume certain facts and then asked for their opinions. They then proceeded to give their opinions.

You will recall that I made some comment to you as to the weight that you were to give those opinions being up to you, and I would comment on that matter in my charge. I am now going to comment.

In evaluating the testimony of an expert witness, you may take into consideration the experience, training and facts available to the expert. You may reject an expert's opinion if you find the facts differ from those forming the basis of the opinion. You may also reject his opinion if, after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion. In other

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words, you are not required to accept the expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

Such an opinion is subject to the same rules regarding reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion and is entitled to such weight as you find the expert's qualifications in his field warrants.

It must be considered by you, but it is not controlling on your judgment.

I have mentioned during the course of the charge burden of proof, preponderance of evidence, words like that. I would like to comment on that.

The mere fact that you find that an accident did occur and Mr. Conceicao was injured as a result does not by itself entitle the plaintiff to a recovery of damages. The defendant ship owner and the carpenters were not insurers of Mr. Conceicao's safety.

Mr. Conceicao, having made the charge of negligence, breach of warranty and that an unseaworthy condition existed at the time of the accident, has the burden of proving the charge that he made, also that one or more of these was a proximate cause of the accident, by what the law terms a fair preponderance of the evidence.

ELP 19

I have mentioned that at two points in my charge now, and I think it is time I defined it for you. What do we mean by a fair preponderance of the evidence? This refers to the quality of the evidence, rather than to the number of witnesses. It means that the evidence submitted by the party having the burden of proof on an issue must be more persuasive and convincing than that opposed to it.

Sometimes in this Court we give jurors an example in the hope that it will give a clearer idea of what we mean by a fair preponderance of the evidence.

Assume that you are in the jury room and you review the testimony and you find evidence that appears credible to you. It favors the plaintiff's side of the case. Imagine that you have an apothecary's scales of justice before you. You put that portion of the evidence on the plaintiff's side of the apothecary's scale. And as you proceed you come to evidence which favors the defendant's side of the case. You put that on the other side of the scale.

You do this until you have reviewed all of the evidence in the case. If at the end of your review of all the evidence you find credible the plaintiff's side of the scale is weighted in his favor, no matter how slightly, he has sustained his burden of proof by a fair preponderance of the evidence.

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If the two sides of the scales are in balance, if they are even, then the plaintiff has failed to sustain his burden of proof. And if the defendant's side is weighted down, then obviously the plaintiff has failed to sustain his burden of proof.

You will review all of the evidence, all the probabilities in making your determination as to whether or not the plaintiff, by the weight of the credible and believable evidence, has sustained his burden of proving negligence, breach of warranty or unseaworthiness.

You are not to speculate as to whether there was negligence, a breach of warranty or the ship was unseaworthy. You are not to guess. Your determination must be based on the facts and the reasonable inferences from the facts as you find them.

So-called direct evidence is not required. Your determination may rest upon circumstantial evidence, which oft times may be more persuasive than direct evidence. If from the facts you find that it is just as reasonable to infer that the accident was not due to negligence, breach of warranty or unseaworthiness as it is to infer that it was due to negligence, breach of warranty or unseaworthiness, then the plaintiff has failed to sustain his burden of proof. That would follow, since in that situation the scales are

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evenly balanced.

I have already referred to the contentions of the plaintiff and the defendants. I have not reviewed the evidence in detail which the various parties rely on to support their respective contentions. Counsel in their summations, just a few moments ago, reviewed in detail the evidence in support of their claims, and it would be needless repetition for the Court to summarize at length the testimony of witnesses whom you have heard during the course of the last few days and whose testimony has been summarized by four attorneys within a very short time of the time you go in to deliberate.

I do suggest, however, that you must consider all the evidence in the case. If upon all the evidence you find the plaintiff has sustained his burden, that negligence, breach of warranty or a condition of unseaworthiness existed and that such negligence, breach of warranty or unseaworthiness was a proximate cause of the accident, either in whole or in part, that is, I would submit -- if he has proved this in whole or in part, he is entitled to recover.

On the other hand, if you find that the defendant carpenters were not negligent and that the carpenters did not breach their warranty of workmanlike performance, your verdict should be for the defendant carpenters. If you find that the ship owner was not negligent and that the vessel was not

ELP 22

unseaworthy or that the accident was due solely and only to Mr. Conceicao's own negligent conduct or the negligence of any of his fellow employees, then your verdict should be for the defendant ship owner.

If you find on all the evidence unseaworthiness, Mr. conceicao did not assume the risk of working on the vessel. However, this did not relieve him of his duty to exercise reasonable care for his own safety. He has a duty to exercise reasonable care for his own safety commensurate with all the attendant circumstances. And if he failed to do so and thereby also by his negligence contributed to the accident, in this type of case I charge you this would only go to reducing damages.

Anyone who has served on a jury before may see there is a difference here.

In charging you in this type of case that we would only have a reduction of damages, not a complete elimination of damages, I must point that out.

We turn now to the matter of damages, I do this without any indication to you from anything I have said in this charge or from any question I have asked during the trial or any statements which I made during the trial to infer that you should find damages. But I wish to charge you as to the law, and I will now charge you on the subject of damages.

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If you find that the defendants were not negligent, that the carpenters did not breach any warranty owed to the plaintiff and that the vessel was not unseaworthy, that is the end of the case, and your verdict should be for the defendants.

Furthermore, if you find that the defendants were negligent or that the carpenters breached their duty or that the vessel was unseaworthy, or any of these or all of these situations, but that nevertheless any negligence of the defendants or any breach of warranty of the carpenters or any unseaworthiness of the vessel which you have found was not the proximate cause of the accident, your verdict must be for the defendants.

On the other hand, if you find that either or both of the defendants were negligent and that such negligence was a proximate cause of the accident, that the carpenters breached their warranty, that the breach of warranty was a proximate cause of the accident or that the vessel was unseaworthy and that such unseaworthiness was a proximate cause of the accident, then you will go on to consider the question of plaintiff's damages.

The burden of proving damages arising out of the accident is on the plaintiff. On the subject of damages, the plaintiff testified that he sustained a serious and

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permanent injury to his left foot, leg and toes and that he sustained, according to Dr. Graubard, a percentage loss of use of his left foot.

The defendants and third-party defendant dispute that the plaintiff suffered as serious an injury as he said, or that he suffered an injury which is permanent.

Through the testimony of Dr. Lodico and Dr. Tagliagambe they say that if plaintiff was injured, that the injury was not as serious as the plaintiff says it was. So there you have an issue to decide: whether or not the plaintiff sustained any permanent injury to his left foot.

The parties have offered testimony in evidence on this subject, including testimony from the plaintiff and Dr. Graubard and Dr. Tagliagambe, Dr. Lodico, and have offered into evidence certain medical records which are available to you.

Again, I will not discuss that testimony and evidence in detail.

Here again, it is your recollection of the evidence which governs, and it is for you to say what weight you will give to the testimony you believe, if you reach that point in your deliberations.

From time to time in this case items of testimony were stipulated and matters were introduced to you as being

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undisputed. For example, the parties have stipulated that as of the date of the accident Mr. Conceicao had a life expectancy of 17.8 years. The parties have also stipulated that Mr. Conceicao incurred medical expenses in the sum of $597.09, which the parties stipulate is fair and reasonable.

Where matters are undisputed and stipulated, you shall accept the stipulation as accurate and accept the facts as stipulated.

If you find that any of the plaintiff's injuries are permanent, you must make such allowance in your verdict as you think that circumstances warrant, taking into consideration the period of time that has elapsed from the date of the injury to the present time and the period of time that the plaintiff can be expected to live.

In this connection, I point out to you once again that the parties have stipulated that as of the date of the accident Mr. Conceicao had a life expectancy of 17.8 years. This is, of course, merely a statistical figure from a mortality table. The fact that this figure is used in the tables and was stipulated does neither assure the span of life that I have given you nor assure that the span of plaintiff's life will not be greater.

The life expectancy figure I have given to you will be considered by you together with your own experience and

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the evidence you have heard in determining the condition of the plaintiff's health, habits, employment and activities, in determining what the plaintiff's life expectancy actually is.

Plaintiff is entitled to be reimbursed for any loss of earnings he has suffered as a result of his injuries from the time he was injured to the present date, and if you find that as a result of his injuries he has suffered a diminution in his earning capacity for such diminution in the future. Any award you make for earnings lost to date may not be estimated but must be calculated from the number of weeks or months that you find plaintiff was disabled by his injuries from carrying on his work and the amount you find he would have earned in that period had he not been disabled.

Any award you make for diminution of plaintiff's earning capacity in the future should be determined on the basis of his earnings prior to the injuries, the condition of his health, his prospects for advancement and the possibilities and probabilities with regard to his future earnings prior to his injuries.

The extent to which you find that his prospects or probabilities have been diminished by the injuries, the length of time you find that plaintiff would reasonably be expected to work had he not been injured, the nature and

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hazards of plaintiff's employment, and any other circumstances which would tend to increase or decrease plaintiff's earning capacity.

If you find that plaintiff is entitled to an award for diminution of his earning capacity in the future, you will fix a dollar amount of such diminution over the entire period that you find plaintiff will suffer that diminution and include that amount in your verdict, if you find for plaintiff.

Your aim here is to award a sum of money which will be fair and reasonable compensation to plaintiff, if you find that either or both of the defendants are liable to the plaintiff.

The plaintiff claims that he was unable to work from November 5, 1970, the date of the accident, to July 6, 1970. He claims lost earnings, as I recall the claim, of $10,000. The plaintiff may only recover the wages lost by being disabled.

You will recall the defendants' contention that he was not in fact disabled for as long a period as he remained out of work. In this connection, you must weigh the testimony of the plaintiff and of the doctors who testified before you as well as the exhibits regarding his ability to work. As I noted, his medical expenses were stipulated to be $597.09.

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The defendants and third-party defendant contend that the plaintiff could have returned to work earlier than he did. It is your recollection that governs, and you can go back to the testimony and exhibits on this, if you choose to. Of course, the fact that I have instructed you as to the proper measure of damages should not be considered as indicating any view of mine as to which party is entitled to prevail. Instructions as to the measure of damages are given for your guidance in the event you find the evidence in favor of the plaintiff.

I will now comment briefly on the question of whether the plaintiff himself contributed to the accident, and, if so, to what extent. The plaintiff was under a duty to exercise reasonable care for his own safety. He was under a duty to take such measures and action for his own safety that you would expect any reasonably prudent person to take under such conditions.

Should you find that the accident was contributed to in part by Mr. Conceicao's own negligent conduct, then there must be a proportional reduction in the amount of damages awarded to him. The defendants, as you know, make such a contention and urge it upon you in addition to their other contentions. Plaintiff denies that he in any way contributed to the accident. Inasmuch as it is disputed, we

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have an issue for you as the triers of the facts.

On this issue of contributory negligence, the burden of proof is on the defendants to sustain their claim of contributory negligence by a fair preponderance of the evidence. Just by way of example, should you find that the defendants have sustained the burden of proof and that Mr. Conceicao was negligent and by such conduct contributed to the accident, say, ten, fifty or ninety per cent, as you may find, then you must reduce the damages accordingly. Of course, if you find he was not negligent, you should make no reduction and award the total damages as you determine them.

If you find that he was wholly and solely negligent, you should reduce any damages by one hundred per cent and, therefore, would give no net recovery to Mr. Conceicao. You may not add any sum to the amount of your verdict for State or Federal income taxes, as the sum recovered by the plaintiff is not taxable income.

So much for the case against the defendants. Obviously, you will reach the issues in the case of the ship owner against the carpenters, the carpenters against the ship owner and the defendants against the third-party defendant only if you have found either or both the carpenters and ship owner liable to the plaintiff. The carpenters and the ship owners' claims have already been mentioned by me and

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the basis for them has been set forth.

In addition, if you should reach this point in your deliberations, there will be questions supplied to you for answers which will clearly set forth the circumstances under which you will make your findings in connection with those particular claims. In that regard, you will be asked to answer such questions as: "Has the defendant New Jersey Export Marine Carpenters, Inc. established its claim that Netumar was negligent or supplied an unseaworthy vessel and that this negligence or unseaworthiness was a proximate cause of plaintiff's accident?"

A second question: "Did any conduct of the Cia. de Naviar Netumar prevent New Jersey Export Marine Carpenters, Inc. from performing carpentry work in a workmanlike manner?"

Another question that you would have presented to you at that point is: "Has Netumar established its claim that the carpenters were negligent or breached their warranty of workmanlike performance of the carpentry work and that this negligence or breach of warranty was a proximate cause of plaintiff's accident?"

B 5 Another question which would be placed before you is: "Has the defendant New Jersey Export Marine Carpenters, Inc. established its claim that International Terminal Operating Co., Inc. breached its warranty of workmanlike

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performance of the stevedoring operations and that this breach of warranty was a proximate cause of plaintiff's accident?"

And there is a final question in that series:

"Has the defendant Cia. Nariar Netumar established its claim that ITO breached its warranty of workmanlike performance of stevedoring operations and that this breach of warranty was a proximate cause of plaintiff's accident?"

You will note that the last two questions mentioned the third party defendant ITO. I would comment briefly on this third-party case here, or the matter of third-party liability.

The carpenters' and the ship owners' position is that if they are called upon to pay damages to the plaintiff, this is because of the breach of warranty of workmanlike performance by the third-party defendant, ITO, which in performing maritime services for and in the vicinity of the S/S Mosqueiro warranted that its work would be performed in a safe, proper and workmanlike manner.

If you find that ITO, the third-party defendant, breached its warranty to either or both defendants, that is, that it failed to perform its services in a safe, proper and workmanlike manner and that as a result Mr. Conceicao sustained injuries, the defendants contend that they are entitled to recover indemnity from the third-party defendant,

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ITO, for any amount they are called upon to pay Mr. Conceicao.

In other words, they are entitled to be made whole for damages awarded against them in favor of the plaintiff.

The obligation owed by ITO, the third-party defendant to the defendants, that is, the ship owners and the carpenters, was to perform its work with reasonable safety and in a proper and workmanlike manner. The defendants contend that if they are found liable to the plaintiff it is because ITO breached its warranty of workmanlike performance.

They contend that the accident was due to the unsafe, improper and unworkmanlike manner in which ITO's employees performed their work.

Essentially, their claim is that ITO was negligent.

ITO denies all these contentions.

The law does not require perfection. ITO contends that it performed its work in a reasonably competent manner, and, accordingly, it urges that the defendants are not entitled to any indemnity from it.

The defendant has the burden of proof of establishing that ITO breached its warranty of workmanlike performance by a fair preponderance of the evidence. ITO's warranty of workmanlike performance required it to see that its stevedores worked under reasonably safe conditions and if the working

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conditions were unsafe, ITO was under a duty to discontinue operations on its own initiative as soon as it knew or should have known it would be unsafe to continue.

Failure to suspend operations when it was unsafe for the men to continue their work, if you do so find, would constitute a breach of a warranty of workmanlike performance, even if you find the ship owner was responsible for the underlying conditions.

ITO's warranty also extended to its employees and warranted that they be employees who would not be negligent in the performance of their duties. Ordinarily, if you find negligence on the part of any officer of ITO, or by fellow workers of Mr. Conceicao, or negligence by Mr. Conceicao, which acted or contributed to the accident, then you have sufficient upon which to find ITO breached its warranty of workmanlike performance.

The failure of the defendants to discover and correct any breach of warranty by ITO, the third-party defendant, affords no defense to the claim which is made here by the third-party plaintiffs.

If you find upon all the evidence that the defendants have established that ITO violated the warranty of workmanlike performance, which casts the carpenters or the ship owners or both in liability to the plaintiff, they are

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entitled to recover indemnity, unless by some action or inaction on their part they or either of them prevented, hindered or seriously handicapped ITO in performing its workmanlike job of fulfilling its obligations.

However, to assert the right to indemnity, the burden of proof by a fair preponderance of the evidence is upon ITO to establish that the defendants were guilty of such negligence barring a recovery, that is, upon all the evidence, if you find ITO was not responsible, that it has sustained its burden for any condition by reason of which you have awarded a recovery against defendants or either of them, then the claim for indemnity should be denied.

If the defendants or either of them have sustained their burden of proof, your verdict will be in favor of the defendants/third-party plaintiffs or one of those third-party plaintiffs which sustained its burden of proof. However, if you find that ITO performed the stevedoring services in a workmanlike manner, and if you find that there was nothing unsafe, improper or unworkmanlike in the manner in which ITO loaded the pipes on the S/S Mosqueiro, then neither third-party plaintiff is entitled to indemnity.

Finally, a few remarks before I conclude. The first of them is on credibility. This is really what it boils down to as far as you are concerned:

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To decide fact issues, you are called upon to determine the credibility of witnesses. Some witnesses were contradicted by other witnesses, and in some instances witnesses made contradictory statements.

At the very start of the trial, before a single word of testimony was taken, I told you that you were to be judges of the facts. This includes judging credibility, in determining the credibility of each witness, and this applies, as I said a few moments ago, to experts as well.

You consider the witness' demeanor before you, how he impressed you, his interest if any in the case or in the parties to the litigation, whether he was frank or forthright or evasive or tended to cover up some matters, whether there was a motive to falsify.

You may take into account opportunity for observation as to matters that were the subject of his testimony. In short, in deciding whether a witness' testimony is credible, that is, acceptable to you, what you do is size him up to determine whether he is reliable or trustworthy as a witness.

If you find that any witness -- and this applies to the plaintiff, the defendants and third-party defendant's witnesses -- testified falsely as to any material fact at the trial, at examinations before trial or in other prior statements, you have the right to reject the testimony of that

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witness in totality, or you may accept that part or portion of his testimony which commends itself to your belief or which you may find to be corroborated, that is, supported by other evidence in the case.

And, finally, however much one might sympathize with the plaintiff, he may not recover unless -- just as every other plaintiff in a civil action -- he sustained his burden of proof.

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If he does, he is entitled to recover. The fact that defendants and the third party defendant are corporations should not enter into your deliberations. All litigants stand as equals before the bar of Justice. Justice cannot prevail if sympathy or prejudice enter into your deliberations.

The oath which you took at the outset of this trial was to render justice fairly and impartially without fear or favor and to decide the issues, the fact issues, solely upon the evidence in this case and in accordance with the Court's instructions as to the law.

Each juror is entitled to his or her own opinion. But you are required to exchange views with your fellow jurors, and that is the very purpose of jury deliberation.

It is your duty to discuss the evidence, if you have a point of view, and if after reasoning with your fellow jurors it appears that your judgment is open to question, then, of course, if you are persuaded, there is no reason why you should not change the point of view originally held by you. But always it must reflect your own conscientious judgment as to how the case should be decided upon the facts and the law.

To return a verdict it must be unanimous. I have prepared a form of verdict which is in three parts, and which in total contains 17 separate questions. You will take the

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first part into the jury room when you begin your deliberations, and when you have completed that, you will return to the courtroom and, depending on how you answer the various questions to the first part, I may or may not send you back to complete the second part. And depending on how you answer the second part, I may or may not send you back to complete the third part.

I have at this point completed my charge. I will see counsel briefly if you would prefer, at the side bar or in the robing room. I would ask the jurors to wait in the jury box, with one request, and that is that the two alternate jurors go into the jury room now and bring out your coats and wraps, whatever you have; because unfortunately, I will not be able to have you accompany the other jurors when they go to lunch. I wish I could, but there are certain restrictions that we have on that subject. So if the alternate jurors will step out of the box for a moment I will see counsel.

(The alternate jurors were discharged.)

THECOURT: If you have anything extensive we can step into the robing room.

(In the robing room.)

THE COURT: Gentlemen, are there any exceptions to the charge or requests for additional instructions?

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MR. DUFFY: Yes, your Honor. The last item first. I listened very carefully to the Court's charge on damages and I did not understand the Court to make any charge that one of the elements of damage was pain and suffering. My understanding and my hearing of the damage charge related solely to earnings, medical and diminution of capacity, which I consider -- I think the whole element is out of there. It's not in there.

I think it would be a substantial defect in the charge as it is presently given.

THE COURT: What else?

MR. DUFFY: If your Honor please, I request the additional charge on proximate cause and instruction to the jury that there may be more than one proximate cause to an accident. And also, your Honor, on the issue of the warranty of the carpenter for workmanlike performance owed to the plaintiff; I would request the Court to distinguish this for the jury, that it carries with it a burden that bears no relation to any blame, fault or notice or other concept of negligence, as you did do on seaworthiness. I request that also be done with the breach of warranty and workmanlike performance owed by the carpenter to the plaintiff.

THE COURT: Anything else?

MR. DUFFY: And I restate at this time the exception

el 4

to the refusal of the Court to charge as was in plaintiff's request to charge, the refused charges.

THE COURT: On that you made your requests and I ruled on the requests. I will file the requests to charge, so that I would suggest that by this means your objections will be preserved.

MR. DUFFY: Thank you, your Honor.

THE COURT: Relative to your request, I will supplement my charge as follows: In connection with damages you may take into account the nature and extent of the plaintiff's injuries, whether they are temporary or permanent in nature, the pain and suffering he has endured, what you believe to be reasonably certain that he will be called upon to endure in the future, and the wages he has lost.

That is what I will charge on that subject because I do believe you are correct. There is a paragraph here and I may in reading my charge have skipped that paragraph, and I will certainly insert that, because it was my intention to do so.

The other requests that you make are denied.

Turning now to Mr. Wrenn.

MR. WRENN: I have no exceptions to your Honor's charge. I would except to your Honor charging pain and suffering at this point for the reason that I think it

el 5

prejudicial and it highlights it, and I think while you may not have specifically gone into that, I think you certainly did give the jury the guidelines upon which they could reach a verdict.

THE COURT: What I will do, then, is for your benefit repeat the very last paragraph of my charge on damages to make it even, which was the last paragraph.

"Of course, the fact that I have instructed you as to the measure of damages should not be considered as intimating any view of mine as to which party is entitled to prevail. Instructions as to the measure of damages are given for your guidance in the event you find the evidence in favor of the plaintiff."

If you like I will add that to the prior paragraph.

MR. WRENN: Thank you, sir.

THE COURT: Turning now to Mr. Cichanowicz.

MR. CICHANOWICZ: I have no exceptions to the charge except the one that Mr. Duffy mentioned with relation to the warranty owed by New Jersey export. I don't believe I have to go into it, but I adopt that and I except to the charge on that ground.

THE COURT: I will be submitting the special questions which we reviewed previously, to the jury. And I think to supplement my charge as Mr. Duffy and you have

el 6

requested will unduly complicate matters at this juncture. I would hope that the jury would be assisted by the questions which we have all reviewed and that this will assist in the matter.

I believe I have charged all the necessary matters, save the matter of pain and suffering and to the extent that you wish me to supplement my charge further, I decline to do so. You have your exceptions.

MR. CICHANOWICZ: That is the part where the warranty, under the warranty New Jersey Export owes a duty whether they have notice or -- whether they are negligent or not to furnish a proper place, negligence is not necessary. In other words, it's similar to the warranty of seaworthiness. That is the part I am talking about. Those duties I think are quite different.

THE COURT: They are different and I tried to chrage differently. I tried to cover the points in my charge. In any event, to the extent that you and Mr. Duffy have asked me to supplement my charge at this time, I decline to do so. YOu have your exceptions.

MR. CICHANOWICZ: Then I also except to the Court's charge for not charging in accordance with requests 9, 10, 14, 16, 19, 21 and 25.

THE COURT: To that extent I will file the

requests to charge to the extent that I have not charged, and it is not correct that I didn't charge, you have your exception.

I will file the requests and they will be part of the record.

MR. TESTA: These will be Court exhibits?

THE COURT: They will be docketed as such. As I understand it, if you wish to take an appeal in connection with a request, which I either didn't charge in substance which I indicated I would, or that I improperly refused to charge in haec verba or at all, those rulings have been made by me now.

Your requests will be filed with the Court and will constitute part of the record. As I understand it, you have your exceptions.

Anything else, Mr. Testa?

MR. TESTA: Yes, your HOnor. First of all, I would like to take exception as I did previously on the record to your Honor's refusal to charge the requests that I gave you in writing which your Honor has indicated are now part of the Court's records.

Secondly, I would take exception to your Honor's charge with respect to life expectancy unless you also include work expectancy which your Honor did not mention.

el 8

THE COURT: That's correct. There was no stipulation on that and no proof of that. I waited for that and there was none. Therefore, it would seems to me under the circumstances I am not in a position to charge that. I know you may say normally a longshoreman would work until 65--

MR. TESTA: And the Court of Appeals has so held.

THECOURT: Are you telling me that I may put in the charge something that was not put into the record by testimony or stipulation?

MR. TESTA: I can, your Honor.

THE COURT: Judicial notice?

MR. TESTA: No. I will give you the same case under which the Court of Appeals has held that 65 was the work expectancy.

THE COURT: This may be the fact. My only point with you, and you know the last case I had, I did charge work expectancy and I expected a stipulation on that.

MR. TESTA: That was from the pretrial order, I believe. I don't believe there was any stipulation during the course of the trial.

THE COURT: The pretrial order is incorporated in the record and I referred to it.

MR. TESTA: But we didn't stipulate at all during the course of the trial with respect to either life or work

el 9

expectancy, and I am simply asking you now to indicate to the jury that work expectancy is age 65.

THE COURT: Without a stipulation from all counsel, I don't think I could do it. If all counsel would stipulate now I'd be willing to do it.

MR. TESTA Perhaps counsel would stipulate.

MR. DUFFY: Not at this time.

MR. CICHANOWICZ: I would be glad to stipulate.

THE COURT: Under the circumstances I decline to supplement my charge on that. You have your exception.

MR. TESTA:Since your Honor has not submitted the last two questions to the jury I am going to hold it in abeyance because at this time I would ask that your Honor submit additional statements to the jury to this respect: With respect to my request to charge 38 I would ask your Honor to charge in the absence of any notice to the contrary the stevedore was properly permitted to assume that the work area in the vessel was reasonably safe.

THE COURT: I decline to do so.

MR. TESTA: And request 39 that the stevedore had no duty or legal obligation to inspect the ship and discover and correct every latent defect or hidden dangerous condition that may have existed in the ship's gear or equipment before sending its men aboard and is not responsible for latent

el 10

defects not discoverable by a cursory inspection.

THE COURT: I decline to so charge.

MR. TESTA: I have one further question, and that is your Honor charged that the stevedore has some duty to stop work, and I would ask your HOnor to charge the jury that in the absence of any notice to the stevodore of any defective condition that they had no duty to stop work.

THE COURT: I decline to supplement my charge. You have your exceptions.

MR. TESTA: If I may say one other thing, I would also like to hold in abeyence the question of conduct sufficient to preclude indemnity depending on how they answer. I would like to make specific requests on that, depending on whatever their answer is.

THE COURT: Before I send an additional set of questions in to them, that is the second or third set of questions, I will give you the opportunity to make any further statement to the Court that you wish to make it that time.

MR. TESTA: Thank you..

THE COURT: Anything else? Thank you.

(End of robing room discussion.)

(In the courtroom in the presence of the jury.)

THE COURT: Ladies and gentlemen, I am going to

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supplement my charge briefly in connection with damages.

You may take into account the nature and extent of the plaintiff's injuries, whether they are temporary or permanent in character, the pain and suffering he has endured, whether you believe to be reasonably certain that he will be called upon to endure in the future, and the wages he has lost. Of course, the fact that I have instructed you as to the proper measure of damages should not be considered you you as intimating any view of mine as to which party is entitled to prvail. Instructions as to the measure of damages are given for your guidance in the event you find the evidence in favor of the plaintiff.

I have now concluded my charge.

(At 1:25 PM two marshals were duly sworn.)

THE CLERK: Your Honor, I am handing the first part of the questions to the foreman.

THECOURT: Yes Unless the Foreman would like it to remain here during lunch hour.

THE FOREMAN: I think that would be best.

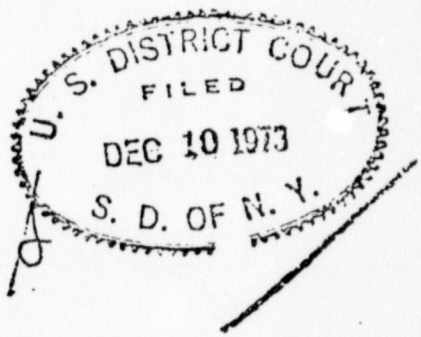
THE COURT: All right.

o0o

OPINION OF WARD, D.J.

Memorandum Decision

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



JOAQUIM CONCEICAO,

Plaintiff,

-against-

NEW JERSEY EXPORT MARINE CARPENTERS INC. and CIA DE NAV. MAR. NETUMAR,

71 Civ. 2550 R.J.W.

Defendants and Third Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING CO. INC.,

Third-Party Defendant.

Defendant and third-party plaintiff Cia de Nav. Mar. Netumar ("the shipowner") moves pursuant to Rules 50(b) and 59(a), Fed. R. Civ. P., for an order setting aside the verdict against it, and for judgment in its favor either dismissing the complaint or granting it indemnity, or in the alternative for a new trial. For the reasons which follow, the motion is denied.

Plaintiff, a longshoreman, testified that on November 5, 1970 while he was engaged in loading pipe into a pipe bed built by the co-defendant New Jersey Export Marine

Carpenters, Inc. ("the carpenters") alongside the number 1 hatch on the shipowner's vessel, one or more of the pipe bed uprights broke, as a result of which a length of pipe weighing approximately 1800 pounds rolled onto his foot, causing injuries.

This action was brought by plaintiff against the carpenters and the shipowner who denied liability, cross-claimed against each other and impleaded the third-party defendant. The questions of whether either or both of the defendants was negligent, as well as the questions of whether the vessel was unseaworthy, whether the carpenters breached any warranty or workmanlike performance, whether plaintiff was negligent, whether the third-party defendant breached its warranty of workmanlike performance and whether any conduct of the shipowner prevented it from recovering indemnity from the third-party defendant were submitted to the jury.

In answers to twelve special interrogatories the jury found the shipowner negligent, and found in favor of the plaintiff, the carpenters and the third-party defendant, respectively.

The shipowner concedes that "on a motion under Rule 50(b) the evidence must be viewed in the light most favorable to the party other than the movant and the motion

should be granted if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair-minded men in the exercise of impartial judgment could not arrive at a verdict against him." Armstrong v. Commerce Tankers Corp., 423 F.2d 957, 959 (2d Cir.), cert. denied, 400 U.S. 833 (1970).

Although the Court might well have reached a different result had the case been tried to the Court alone, there is sufficient probative evidence to support the verdict and reasonable and fair-minded men in the exercise of impartial judgment could arrive at the verdict reached by the jury.

William Montella, the carpenters' foreman, testified that Richard A. Piper, the port captain for the shipowner, told him exactly what to do in connection with the construction of the pipe bed including what nails and lumber to use. Moreover, he testified that he was not told how many pipes were to be stowed in the pipe bed beside the number 1 hatch or how much they weighed, nor was he shown the stowage plan. Significantly, the jury asked to see the stowage plan. Mr. Piper testified in a portion of his deposition which was read to the jury that the pipe bed was constructed pursuant to oral instructions which he gave to Mr. Montella and also that as port captain he was responsible for the loading of the vessel in conjunction with the ship's officers.

The foregoing evidence would be consistent with the finding of the jury that the vessel was seaworthy and that the carpenters performed their duties in a workmanlike manner. It is also consistent with the finding that the shipowner's conduct was sufficient to preclude indemnity because it exercised overall control over the construction of the pipe bed and the loading of the vessel.

The Court finds that the probative evidence is adequate to support the conclusion that the shipowner failed in its non-delegable obligation to furnish plaintiff a reasonably safe place to work. Despite the incidental delegation of certain functions to others, in this case the carpenters and the third-party defendant, the shipowner remained responsible for performing the overall operation with reasonable care. Its failure to perform the overall operation with reasonable care created an unsafe condition and properly resulted in the jury's finding of liability. Accordingly, the shipowner's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, is in all respects denied.

It is so ordered.

Dated: December 10, 1973

Robert K. Ward
U. S. D. J.

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JUDGMENT

U.S. DISTRICT COURT FILED NOV 9 1973 S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAQUIM CONCEICAO,

Plaintiff, : 71 Civil 2550(RJW)

-against- : JUDGMENT

NEW JERSEY EXPORT MARINE CARPENTERS INC. AND CIA DE NAV. MAR. NETUMAR, Defendants and Third-Party Plaintiffs, : #73,889

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC., Third-Party Defendant.

MICROFILM NOV 9 1973

The issues in the above entitled action having been brought on regularly for trial before the Honorable Robert J. Ward, United States District Judge, and a jury on October 29, 30, November 1, 2 and 5, 1973, and the Court having submitted the attached special verdict to the jury, and the jury having answered the special verdict as indicated thereon, and the jury having returned the special verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED AND DECREED, that plaintiff, JOAQUIM CONCEICAO, have judgment against the defendant, CIA DE NAV. MAR. NETUMAR, in the amount of $42,000.00., and it is further,

ORDERED, that the third-party complaint against the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., be and hereby is dismissed.

Dated: New York, N. Y.
November 7, 1973

APPROVED:

United States District Judge.

Raymond F. Burghardt
Clerk

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Judgment

At a Slated Term of th United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the day of in the year of our Lord, One Thousand Nine Hundred and

PRESENT:
HONORABLE: Robert J. Ward
United States District Judge.

Joaquim Conceicao
-vs-
New Jersey Export Marine Carpenters, Inc and Cia De Nav. Mar. Netumar
Dept. & 3rd Pty. Plff
-vs-
International Terminal Operating Co. Inc.

Docket No. 71 Civ 2550

Now comes the Plaintiff By Baker, Garber, Duffy & Baker, Esqs. by George J. Duffy

and moves the trial of this cause. Likewise comes the Defendant by N.J. Export Martein, Hrenz & Cumins, Esqs. by Martin Hrenz, of counsel; Dept. Cia De Nav. Mar. Netumar by Richardson & Callan, Esqs. Dept. by Victor Richardson, of counsel; by 3rd Pty Deft Alexander, Ash, Emanuel & Cohen, Esqs. by Louise V. Testa, of counsel

2 3 1973 Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial.
3 " trial begun
3 " continues
1 " " "
2 " 1973 " concluded, Jury deliberating
5 " 1973 Jury deliberating. Verdict (attached)
10 days for motions. 5 days to reply

Ursula Kruger

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOAQUIM CONCEICAO,

Plaintiff,

-against-

NEW JERSEY EXPORT MARINE CARPENTERS INC. and CIA DE NAV. MAR. NETUMAR,

Defendants and Third Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING CO. INC.,

Third Party Defendant.

----------x

VERDICT

71 Civ. 2550

1. Has plaintiff established his claim that the defendant New Jersey Export Marine Carpenters Inc. was negligent and that its negligence was a proximate cause of plaintiff's accident? (Answer yes or no) NO

2. Has plaintiff established his claim that the defendant Cia de Nav. Mar. Netumar was negligent and that its negligence was a proximate cause of plaintiff's accident? (Answer yes or no) YES

3. Has plaintiff established his claim that the ship S.S. MOSQUEIRO was in an unseaworthy condition and that

this unseaworthiness was a prcximate cause of plaintiff's accident? (Answer yes or no) NO

4. Has plaintiff established his claim that the defendant New Jersey Export Marine Carpenters Inc. breached any warranty of workmanlike performance which it owed plaintiff and that this breach of warranty was a proximate cause of plaintiff's accident? (Answer yes or no) NO

5. If the answers to Questions 1 and 4 are "no", your verdict is for the defendant New Jersey Export Marine Carpenters Inc., and you should put an "X" here. X

6. If the answers to Questions 2 and 3 are "no", your verdict is for the defendant Cia de Nav. Mar. Netumar, and you should put an "X" here. _____

7. If the answer to Question 1, 2, 3 or 4 is "yes", what is the total dollar amount of damages to plaintiff?
$ 42,000

8. In the event you have found above that the plaintiff is entitled to recover, do you find that the defendants have established their claims that plaintiff was himself negligent and that his negligence was a proximate cause of the accident? (Answer yes or no) NO

9. If the answer to Question 8 is "yes", what percentage did plaintiff's fault so contribute? 0 %
(If the answer to Question 8 is "no", do not answer this question.) If you entered a percentage on this question, fill in its equivalent dollar amount here. $ 0

10. Subtract the dollar amount stated in Question 9 from the total amount of damages stated in Question 7 and enter here the difference, which will be the net amount of damages you find the plaintiff is entitled to recover:

Question 7 total $ 42,000

\- Question 9 total $ _____

Net Recovery $ 42,000

PLEASE ANSWER THE FOLLOWING QUESTIONS

11. Has defendant Cia de Nav. Mar. Netumar established its claim that International Terminal Operating Co., Inc. breached its warranty of workmanlike performance of the stevedoring operation and that this breach of warranty was a proximate cause of plaintiff's accident?
(Answer yes or no) YES

12. Did any conduct of defendant Cia de Nav. Mar. Netumar prevent the shipowner from recovering indemnity from International Terminal Operating Co., Inc.?
(Answer yes or no) YES

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAQUIM CONCEICAO,

Plaintiff,

-against-

NEW JERSEY EXPORT MARINE CARPENTERS INC. and CIA DE NAV. MAR NETUMAR,

Defendants and Third-Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

71 Civ. 2550 (RJW)

NOTICE OF APPEAL

S I R S:

PLEASE TAKE NOTICE that the defendant and third-party plaintiff COMPANHIA DE NAVEGACAO MARITIMA NETUMAR, sued herein as CIA DE NAV. MAR NETUMAR, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment dated November 7, 1973, and filed and entered in the Office of the Clerk of this Court on November 9, 1973, which adjudged that the plaintiff, JOAQUIM CONCEICAO, have judgment against defendant, CIA DE NAV. MAR NETUMAR, in the amount of $42,000.00 and that the third-party complaint against third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., be dismissed and from each and every

part thereof and from the order dated December 10, 1973, and filed and entered in the Office of the Clerk of this Court on December 10, 1973.

Yours, etc.

Dated: New York, New York
January 8, 1974.

CICHANOWICZ & CALLAN

By: VICTOR S. CICHANOWICZ
Member of the Firm

Attorneys for Defendant
and Third-Party Plaintiff
CIA DE NAV. MAR NETUMAR.
Office & P.O. Address:
80 Broad Street
New York, N. Y. 10004
344-7042

TO:

BAKER, GARBER, DUFFY & BAKER, Esqs.
Attorneys for Plaintiff
1 Newark Street, Hoboken, N.J. 07030

LARKIN, WRENN & CUMISKY, Esqs.
Of Counsel to COPPOLA & D'ONOFRIO, Esqs.
Attorneys for Defendant and Third-Party
Plaintiff, NEW JERSEY EXPORT [illegible] CARPENTERS, INC.
11 Park Place, New York, N. Y. 10007

ALEXANDER, ASH, SCHWARTZ & COHEN, Esqs.
Attorneys for Third-Party Defendant, I.T.O.
801 Second Avenue, New York, N. Y. 10017

NOTICE OF PROTECTIVE CROSS APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X
JOAQUIM CONCEICAO,

Plaintiff,

-against-

NEW JERSEY EXPORT MARINE CARPENTERS INC. and CIA DE NAV. MAR NETUMAR,

Defendants and Third Party Plaintiffs,

71 Civ. 2550 (RJW)

NOTICE OF PROTECTIVE CROSS APPEAL

-against-

INTERNATIONAL TERMINAL OPERATING COMPANY INC.,

Third Party Defendant
- -X

PLEASE TAKE NOTICE that plaintiff, Joaquim Conceicao, hereby appeals protectively to the United States Court of Appeals for the Second Circuit from those portions of the judgment filed and entered herein November 9, 1973 on the jury's verdict on special interrogatories in which judgment was granted in favor of defendant, Companhia de Navegacao Maritima Netumar on the cause of action for unseaworthiness, and in which judgment was granted in favor of defendant, New Jersey Export Marine Carpenters, Inc., on the causes of action for negligence and breach of warranty.

Dated: January 10, 1974

BAKER, GARBER, DUFFY & BAKER
Attorneys for Plaintiff

By /s/ [illegible]
[illegible] J. DUFFY
Office and P.O. Address
1 Newark Street
Hoboken, New Jersey 07030
-and-
c/o Holwell & Crispino, Esqs.
79 Wall Street
New York, New York 10005

TO: CLERK,
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

TO: CICHANOWICZ AND CALLAN, ESQS.
Attorneys for Defendant & Third Party Plaintiff,
Cia De Nav. Mar Netumar.
80 Broad Street
New York, New York 10004

TO: LARKIN,WRENN & CUMISKY, ESQS.
Attorneys for Defendant & Third Party Plaintiff,
New Jersey Export Marine Carpenters Inc.
11 Park Place
New York, New York 10007

TO: ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third Party Defendant, ITO
801 Second Avenue
New York, New York 10017

Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOAQUIM CONCEICAO,

Plaintiff-Appellee,

-against-

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,

Defendant and Third-Party Plaintiff-Appellee,

-and-

CIA DE NAV. MAR NETUMAR,

Defendant and Third-Party Plaintiff-Appellant,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 15th day of May, 19 74, he served two copies of the Joint Appendix on Baker, Garber, Duffy & Baker, Esqs. the attorneys for the Plaintiff-Appellee by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. 1 Newark Street, Hoboken, N.J. 07030 ( )XXXX, that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
15th day of May, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-547920
Qualified in New York County
Commission Expires March 30, 1976

Due and timely service of TWO copies
of the within APPENDIX is hereby
admitted this 15th day of MAY 1974

Parker, McCay & Criscuolo by W.F.L.
Attorneys for DEFENDANT AND
THIRD-PARTY PLAINTIFF APPELLEE
NEW JERSEY MARINE EXPRESS

Alexander, Ash, Schwartz & Cohen
ATTORNEYS FOR THIRD-PARTY DEFENDANT-APPELLEE